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73-208

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice
Honorable WALTER DIXON, Justice
Honorable THOMAS J. MORAN, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On April 7, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

FILED
APR 7 1975
LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the Circuit Court
	)	for the 19th Judicial Circuit,
JOHN WILLIAM MAHAR,	)	McHenry County, Illinois.
)	
Defendant-Appellant.)	

MR. PRESIDING JUSTICE RECHENMACHER delivered the opinion of the court:

The defendant was charged with the offense of indecent liberties with a child. Upon a negotiated plea of guilty he was sentenced to a term in the penitentiary of not less than 4 years nor more than 4 years and 1 day.

This appeal is based on the contention that the trial court committed reversible error by accepting the defendant's plea of guilty without first adequately admonishing him as to, and determining that the defendant understood, the nature of the charge, as required under Supreme Court Rule 402(a), (Ill. Rev. Stat. 1971, ch. 110A, par. 402(a)).

The record of the proceedings shows that the defendant was present with his court appointed attorney at the hearing at which the guilty plea was accepted. Defendant's counsel informed the court that he had reached an agreement with the State's Attorney whereby the defendant would plead guilty to the charge of indecent liberties and the State's Attorney would recommend a 4 year to 4 year and 1 day sentence as part of the agreement. Another charge--auto theft--would be dropped.

Before accepting the plea of guilty the trial judge asked the State's Attorney to summarize the evidence the State intended to present if there was a trial. The State's Attorney then related that

several children who were playing with the victim--a nine year old girl--observed the defendant fondling the victim in a lewd way. Defense counsel agreed that if the State's witnesses were called they would testify as indicated by the State's Attorney.

The court then went over the plea agreement with the defendant and inquired if he understood it and agreed to it, to which the defendant answered affirmatively. The court then admonished the defendant thoroughly as to his right to remain silent, to confront adverse witnesses and to a trial by jury and asked if the events described by the State's Attorney had indeed occurred on the date in question, to which the defendant replied affirmatively. The court then informed the defendant of the possible minimum and maximum sentence and after determining that the guilty plea had not been induced by threats or promises, accepted the plea.

Since the main contention of the defendant as to his admonishment is that the judge did not adequately determine that the defendant understood the nature of the charge, we set out below the colloquy between the court and the defendant as related to this point, to-wit:

"THE COURT: Q Have you read the Indictment in this case, and do you know what the charges contained therein are?

DEFENDANT MAHAR: I have, Your Honor.

THE COURT: Q You know you are charged with Indecent Liberties with a Child, occurring September 9, 1972, in McHenry County?

DEFENDANT MAHAR: Yes, Your Honor, I do.

THE COURT: Q Will you explain to the Court your understanding of the charges contained in the Indictment? How do you understand what you are being charged with?

DEFENDANT MAHAR: Your Honor, I understand that I committed certain acts that would cause the Court or Jury, or anyone who heard them, to believe that this charge is true.

THE COURT: Q Well, do you realize that you are charged, here, with these acts--Indecent Liberties, involving a child, Helen J. Simmonds--do you understand that?

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DEFENDANT MAHAR: I do, Your Honor.

THE COURT: Q And, you understand what "Indecent Liberties with a Child" means, don't you?

DEFENDANT MAHAR: My lawyer has explained it to me.

THE COURT: Do you understand it, from your own information?

DEFENDANT MAHAR: Yes, sir, I do.

THE COURT: And the events which you have been charged with, here, did take place on September 9, 1972, in McHenry County, is that right?

DEFENDANT: Yes, your Honor."

We believe this colloquy indicates a very conscientious effort on the part of the trial court to make sure that the defendant understood the nature of the charge. The defendant contends the court was not specific enough in admonishing defendant and making sure he understood the nature of the charge. It appears from the above that this contention is unfounded. The court required the State's Attorney to outline the testimony and the State's Attorney's recital of the facts was not demurred to by the defendant or his attorney. As was said by our Supreme Court in the recent case of People v. Krantz, 58 Ill. 2d 187, in describing a similar contention with regard to Supreme Court Rule 402(a):

"We note first the rule requires that there need be only substantial, not literal, compliance with its provisions. (People v. Mendoza, 48 Ill. 2d 371, 373-374.) Also, the entire record may be considered in determining whether or not there was an understanding by the accused of the nature of the charge. People v. Doyle, 20 Ill. 2d 163, 167; People v. Harden, 38 Ill. 2d 559, 563, aff'g People v. Harden, 78 Ill. App. 2d 431, 444-445." (58 Ill. 2d 192.)

Taking the record as a whole there can be no doubt that the defendant was thoroughly admonished in this case and that the trial court was justified in determining that the defendant understood the nature of the charge. It is not to be expected that the defendant would himself describe the details of an incident of this kind but if the court determined that the defendant's response indicated he understood the



import of the "certain acts" which he admitted to and that these acts amounted to taking indecent liberties with a child, this was sufficient to comply with the requirements of the rule.

The defendant cites two cases decided by this court, People v. Cummings, 7 Ill. App. 3d 306 and People v. Ratliff, 11 Ill. App. 3d 274, wherein we reversed the trial court's judgment because of inadequate admonishment. Both of these cases are easily distinguishable from the present case. In Cummings, to begin with the defendant had a history of being confined in a mental institution. Moreover, a printed form was used which recited that the defendant had received, read and discussed "with my attorney" the charges set forth in the indictment and that his constitutional rights had been explained to him. There was, however, no indication in the record that the judge actually explained or that the defendant understood, the nature of the charge. Nor was there any mention in the proceedings of the factual basis for the plea. Obviously there was a gross inadequacy in admonishing the defendant in that case, not in any way comparable to the conscientious effort made by the trial court in the case before us to comply with the requirements of Supreme Court Rule 402.

In the Ratliff case--which also involved indecent liberties--there were substantial omissions in the admonishment not lacking in the case before us. There was a bare mention of "indecent liberties with a child" without any further attempt to make sure the defendant understood the specific acts he was charged with. In the instant case these facts were recited in the defendant's presence by the State's Attorney. In addition, in the Ratliff case, no reference was made to the defendant's right to remain silent, that he was waiving his right to a trial by jury and his right to confront his accusers and there was a substantial lack of compliance with par. (b) of the Rule as to voluntariness of the plea. In the Cummings case, a printed form was used to cover the gap in the court's admonishment and there was no inquiry, as there was here, as to inducement for the plea agreement. Thus, the case was substantially different both in the letter and the spirit as



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compared with the case we consider here. Neither Cummings nor Ratliff, in our opinion, give any support to the defendant's contention as to inadequate admonishment--they are different cases all together.

The other cases cited by the defendant we do not find to be in point. People v. Ingeneri, 7 Ill. App. 3d 809, related to a failure to adequately inform the defendant as to the maximum and minimum sentences and People v. Bauswell, 12 Ill. App. 3d 35, while a case of indecent liberties, concerned a defendant who equivocated as to his guilt and at one point actually denied the ^{conduct} that he was charged with. These cases have no parallel with the case before us.

We are of the opinion the defendant was thoroughly and adequately admonished under the requirements of Supreme Court Rule 402 and the judgment of the trial court is hereby affirmed.
Judgment affirmed.

THOMAS J. MORAN and DIXON, JJ., concur.



27 I.A. 30

27 I.A. 44

73-442

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On April 7, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

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73-442

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

FILED

APR 7 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,)
) Appeal from the 18th
Plaintiff-Appellee,) Judicial Circuit,
)
v.) DuPage County, Illinois.
)
PHILLIP JAROS,)
)
Defendant-Appellant.)

MR. JUSTICE GUILD delivered the opinion of the court:

Defendant pled guilty to the offense of burglary and was sentenced to a term of 1-3 years in the Illinois State Penitentiary. On direct appeal to this court, appointed counsel's motion to withdraw was allowed and defendant's conviction was affirmed. People v. Jaros (1973), 15 Ill.App.3d 37, 303 N.E.2d 159.

Defendant filed a pro se post-conviction petition in the trial court, which was later amended by appointed counsel. The amended petition alleged that the representation afforded defendant by appointed trial counsel, Assistant Public Defender Bowman, was ineffective. In support of his amended petition, defendant also filed three affidavits in the trial court. The three affiants were the defendant; one Jack Borg, a participant in the burglary; and one Charles Hamm, an investigator for the Public Defender for DuPage County. On the State's motion, the trial court dismissed the defendant's petition for post-conviction relief without a hearing for failure to raise a substantial constitutional question. This appeal followed.

On November 23, 1971, defendant was arraigned on a two-count indictment, charging burglary and theft. The defendant was represented at arraignment by Assistant Public Defender Botti. On January 21, 1972, following a hearing on defendant's motion to suppress evidence

and the denial of said motion, Botti requested that the court set the case for trial during the month of February because, Botti stated he was leaving the Public Defender's office on March 1, 1972. The case was continued to February 8, 1972 for trial.

Defendant failed to appear for trial on February 8, 1972 and his bond was forfeited and an arrest warrant issued. Defendant next appeared in court on March 10, 1972 and the Public Defender was again appointed to represent the defendant. On March 21, 1972 Assistant Public Defender Bowman appeared in court with the defendant on motions which were granted, to set the case for trial on April 12, 1972 and to vacate the bond forfeiture.

Defendant appeared in court on April 12, 1972, represented by Bowman, and pled guilty to the charge of burglary. The record of that proceeding indicates that the guilty plea was in accordance with a plea negotiation agreement which consisted of (1) defendant entering a plea of guilty to burglary, and (2) the State dismissing the theft count of the indictment, dismissing four deceptive practice charges, dismissing two aggravated battery charges, agreeing not to prosecute four other check charges totalling \$145 and recommending a sentence of 1-3 years upon defendant's plea of guilty.

The basic thrust of defendant's argument is that Assistant Public Defender Bowman was not sufficiently familiar with the factual and legal issues of the case to adequately represent and advise the defendant. The issue before this court is whether petitioner is entitled to a hearing on his claim of ineffective representation by Assistant Public Defender Bowman.

The rule is well settled in Illinois that when an appeal is taken, as it was in this case, the judgment of the reviewing court is res judicata, not only as to all issues actually raised but also as to those issues which could have been raised but were not, the latter issues being deemed to have been waived. (People v. Derengowski (1970), 44 Ill.2d 476, 256 N.E.2d 455.) A post-conviction proceeding is a new proceeding for purposes of inquiry into the constitutional phases of the original conviction which have not already been

-3-

adjudicated. (People v. Ashley (1966), 34 Ill.2d 402, 216 N.E.2d 126.) As noted above, defendant filed a timely appeal with this court following his conviction. Upon receiving notice of his appellate counsel's intention to withdraw in the direct appeal as noted above, defendant filed pro se documents contending that appointed counsel at trial encouraged him to plead guilty, thereby depriving him of the right to raise a substantial constitutional question of search and seizure; and that his counsel's representation was "limited". Despite these assertions, this court, after reviewing the entire record together with the pro se and other documents filed, allowed the motion to withdraw and affirmed the judgment of the trial court. Since the issues which form the basis of this appeal were raised in the defendant's direct appeal they are now res judicata. Those issues which could have been raised but were not are waived. Furthermore, there is nothing contained in the instant record which suggests that we should apply the doctrine under which courts of review may relax the strict application of the waiver rule where required by fundamental fairness. See People v. Hamby (1965), 32 Ill.2d 291, 205 N.E.2d 456.

Since we find that the issue of the effectiveness of appointed counsel was raised by defendant in his direct appeal and that said issue is now res judicata, we affirm the dismissal of defendant's amended post-conviction petition.

AFFIRMED.

SEIDENFELD, P.J. AND HALLETT, J. CONCUR





LAYMAN WALLACE GARNER,)
) HON. DANIEL J. RYAN,
) JUDGE PRESIDING.
Appellant.)

Mr. JUSTICE BURMAN delivered the opinion of the court.

The defendant, Layman Wallace Garner, entered a plea of guilty on March 12, 1969, to the charge of murder and was sentenced to serve a term of 15 to 20 years in the State Penitentiary.

No direct appeal was taken by defendant. On April 2, 1973, he filed a post-conviction petition in which he alleged that there was a denial of his rights. On June 12, 1973, the Public defender filed his appearance. On April 1, 1974, a supplemental petition was filed alleging as grounds for relief that there was a substantial denial of his constitutional rights, namely that he was not properly admonished in his plea of guilty. On April 3, 1974, the public defender filed a Certificate in compliance with Rule 651(c) of the Illinois Supreme Court. On the same date, a hearing was held on the Pro Se Petition and the Supplemental Petition and it was denied and the petition was dismissed. The Public defender states that it appears from a review of the record that the only basis for appeal would be whether the trial court fully admonished the petitioner regarding his change of his plea of not guilty to a plea of guilty and whether it was error for the trial judge to dismiss his post-conviction petition.

On December 17, 1974, the public defender filed a motion, after serving the defendant with a copy, for leave to withdraw as counsel for the defendant on the ground that the appeal was without merit.

In support thereof, and pursuant to the ruling in the case of Anders v. California, 386 U.S.738, the public defender attached a brief to the motion.

It appears from the transcript of the evidence that before the defendant changed his plea a conference had been held. He was represented by counsel of his own choosing. His attorney informed the court that the defendant was happy to have him represent him as his attorney and he desired to plead guilty of his own voluntary will. The defendant then told the court "that's right."

The following colloquy took place.

The Court: Layman, am I correct you wish to change your Plea of not guilty heretofore entered and enter a plea of guilty to the charge of murder?

The Defendant: Yes, sir.

The Court: To the indictment in this case?

The Defendant: Yes, sir.

The Court: Do you realize if you plead guilty to this charge you waive your right to trial by jury?

The Defendant: Yes, sir.

The Court: Do you understand under the law you are entitled to have a jury of your peers to determine your guilt or innocence?

The Defendant: Yes, sir.

The Court: If you plead guilty, you waive that right.

The Defendant: Yes, sir.

The Court: Do you know what you are doing?

The Defendant: Yes, sir.

The Court: Do you realize that on a finding of guilty of this court to the charge of murder, I can sentence you to the Illinois State Penitentiary for a term of not less than 14 years up to any number of years greater than 14 years or also death.

The Defendant: Yes, sir.

The public defender points out that in the instant case, the record discloses that the trial court discussed with the petitioner (defendant) the significance of the plea of guilty

and advised him of the consequences of a guilty finding. He concludes that the court adhered to the applicable statutes and Supreme Court Rule in its admonishment to petitioner on his plea of guilty and therefore the appeal is without merit.

The record reveals that the court informed the defendant of his rights before accepting his plea and we find that his plea of guilty was voluntary and understandingly made.

The facts as disclosed by the record are that on November 24, 1968, at 2:30 A. M., the defendant was driving or was a passenger in an automobile driven by his friend, Joseph Louis Momare. The deceased was also a passenger. Words were passed. The defendant fired a .22 revolver, striking the deceased in the right ear, killing him.

The defendant was notified by this court of the public defender's motion for leave to withdraw as his counsel and a copy of the public defender's motion and brief was attached. The defendant was informed that he had until February 17, 1975, to file any further points he might have in support of his petition. We informed him that after such date we would make a full examination of all the proceedings and decide whether the appeal is wholly frivolous and if we so find we may grant the public defender's request for withdrawal and affirm the judgment without further appointment of counsel.

We have made a complete examination of all of the proceedings in accordance with the requirements of Anders v. California, 386 U.S.738 and have concluded that there is no merit to this appeal. The public defender's request for leave to withdraw as counsel for the defendant is therefore granted, and the dismissal of the petition is affirmed and the appeal dismissed.

Appeal dismissed and judgment affirmed.

DIERINGER, P. J., and
ADESKO, J., concur.

(Abstract only)

60351

3D
27 I.A. 71



PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM
Plaintiff-Appellee,)	CIRCUIT COURT,
v.)	COOK COUNTY.
HAYES STEELE,)	HONORABLE
Defendant-Appellant.)	LOUIS B. GARIPPO,
	PRESIDING.

Mr. JUSTICE JOHNSON delivered the opinion of the court:

The defendant, Hayes Steele, was indicted for the offense of armed robbery. After a bench trial, he was found guilty of the lesser-included offense of robbery and sentenced to a term of 2 to 8 years in the penitentiary.

A notice of appeal from the conviction was timely filed. However, appointed counsel has filed a motion and brief in this court for leave to withdraw as counsel pursuant to Anders v. California (1967), 386 U.S. 738, 18 L.Ed. 2d 493, 87 S.Ct. 1396. In his brief, counsel discusses various points which arguably might be raised on appeal but concludes that the record contains no issue which would support reversal on appeal. Thus, in the opinion of counsel, an appeal would be wholly frivolous.

Copies of appointed counsel's motion and brief were mailed to the defendant on August 13, 1974. Defendant was further advised by this court on December 3, 1974 to file any points he might choose in support of his appeal no later than February 1, 1975, after which date the court would make a full examination of all proceedings and decide whether the appeal is frivolous. The defendant has neither obtained new counsel nor filed any briefs in support of his appeal.

After carefully reviewing the record, we agree with appointed counsel that there are no grounds for appeal which are not frivolous. Accordingly, the motion of appointed counsel

for leave to withdraw as counsel is granted and the judgment of the circuit court of Cook County is affirmed.

Motion allowed.
Judgment affirmed.

DIERINGER, P.J. and BURMAN, J., concur.

Abstract only.

60233)
60234)

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27 I.A. 72



PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM
Plaintiff-Appellant,)	CIRCUIT COURT,
v.)	COOK COUNTY.
PEDRO D. ALVERIO,)	
Defendant-Appellee.)	HONORABLE
	DAVID CERDA,
	PRESIDING.

Mr. JUSTICE JOHNSON delivered the opinion of the court:

Pedro D. Alverio, defendant, was charged in a complaint with keeping a gambling place in violation of section 28-3 of the Criminal Code. (Ill. Rev. Stat. 1971, ch. 38, §28-3.) The State appeals pursuant to Supreme Court Rule 604 (a)(1) from the order of the trial court sustaining the defendant's motion to quash the search warrant. We reverse.

The appellee has not filed any briefs in accordance with Supreme Court Rule 341 (Ill. Rev. Stat. 1971, ch. 110A, §341). Where a party who prevails in the trial court does not appear or file a brief, this court may, in its discretion, determine the case on its merits or may reverse without further consideration or discussion. (People v. Spinelli (1967), 83 Ill. App. 2d 391, 227 N.E. 2d 779.) In spite of the fact that the appellee has filed no briefs, we will exercise our discretion and dispose of the case on its merits.

This case is before this court to consider the question of what showing is constitutionally necessary to satisfy a judge that there is probable cause to issue a warrant, when the complaint of the affiant officer is based on hearsay information supplied by an anonymous informant. The warrant in this case was issued by a judge on the basis of the following complaint, requested by Michael Katalinic, the affiant:

This informant told me that a man known to him as Pedro Alverio, a male Puerto Rican, who resides at 2776 W. Francis Place, 1st floor, is accepting Bolita

wagers and Boli Pul tickets and other forms of Spanish lotteries at that location. This informant stated further that he has been turning in his Bolita wagers and Boli Pul tickets to Pedro Alverio for the past 5 weeks, on either Monday or Tuesday evening at 2776 W. Francis Place, 1st floor, and that the man told him that he keeps his records and Puerto Rican National Lottery in the basement of that address.

Surveillance: On the 7th of August, 1972, at approximately 5 p.m., I again met with the informant at the intersection of Armitage and California Streets, Chicago, Illinois. At this time the informant stated to me that he would turn in his Bolita wagers and Boli Pul tickets and money to Pedro Alverio at his residence, 2776 W. Francis Place, 1st floor. * * * Keeping the informant in view, I observed him hand the examined parcel to a male Puerto Rican. They had a short conversation and both the informant and the man entered the 1st floor of 2776 W. Francis Place. * * * In continuing the surveillance for approximately 30 minutes, between 5:10 p.m. and 5:40 p.m., I observed five male Latinos at different times walk up to and enter the 1st floor of 2776 W. Francis Place. They all stayed a short time and departed the area.

* * *

Reliability: I have known this informant for the past 6 months, during which time he has supplied me with accurate and reliable information, which has resulted in two successful gambling raids, each of these raids resulting in one or more arrests, * * *.

The defendant in this case challenged the legality of the search warrant with a motion to quash, which is the appropriate procedure to follow. (People v. Smith (1960), 20 Ill. 2d 345, 169 N.E. 2d 777; People v. Considine (1969), 107 Ill. App. 2d 389, 246 N.E. 2d 81.) A reviewing court must sustain the determination of the judge who issued the warrant as to the existence of probable cause, so long as there is a substantial basis for that determination. People v. Close (1965), 60 Ill. App. 2d 477, 208 N.E. 2d 345.

The trial judge in the instant case decided not to follow Close. When hearing the motion to quash search warrant and suppress evidence illegally seized, he sustained the motion on the ground that one of the search warrants—or both of the search

warrants are defective in that they are not supported by good affidavits. The judge also agreed with defense counsel's argument that you cannot send an informant in with evidence and then go in and find that evidence.

Standards for gauging the sufficiency of a complaint for a search warrant have been established. A search warrant will issue only upon a finding of probable cause. (U.S. Const. amend. IV; Ill. Const. art. I, §6.) Illinois courts have followed the decisions of the United States Supreme Court when ruling on the legality of searches and seizures. (People v. Saiken (1971), 49 Ill. 2d 504, 275 N.E. 2d 381; People v. Williams (1967), 36 Ill. 2d 505, 224 N.E. 2d 225.) We feel that the United States v. Harris (1971), 403 U.S. 573 is the beacon to be followed in this case.

In Harris, the Supreme Court held that hearsay information set forth in an affidavit may be sufficient to support the issuance of a search warrant, as long as the affidavit contains a substantial basis to support the credibility of the hearsay information. (403 U.S. 573.) In explaining the reasons for its decision, the court points out that the personal and recent observations by an unidentified informant of criminal activity, is a factor that shows that the information had been obtained in a reliable manner. Furthermore, the court states that if the informant has previously given accurate information and the story has been corroborated by other sources, it becomes more reliable. Finally, Harris establishes that extrajudicial declarations against penal interests are additional reasons for crediting an informant's tip.

In the instant case the informant related to the affiant officer recent, personal observations of criminal activity in the apartment to be searched. The story of the informant can also be

corroborated in the case under review. The police officer, in his affidavit, states that he observed the informant turning contraband over to a male person at the Francis Place address and, continuing his surveillance for approximately 30 minutes, observed five men entering the place to be searched at different times. Finally, the informant in our case had previously provided the officer with information which resulted in two successful gambling raids. Therefore, under Harris and the requisites of the fourth amendment, the underlying facts and circumstances presented in the affidavit in support of the warrant provided a substantial basis for the magistrate to conclude that probable cause existed.

We are of the opinion that the complaint and affidavit herein comply with the standards established in United States v. Harris (403 U.S. 573). Consequently, the judgment of the circuit court is reversed and the case is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

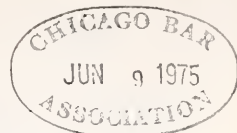
BURMAN and ADESKO, JJ., concur.

Abstract only.

60081

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27 I.A. 73

dupl



PEOPLE OF THE STATE OF ILLINOIS,)
)
 Appellee,)
)
)
v.)
)
JERRY CONNOR,)
)
 Appellant.)

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

HONORABLE
ROBERT J. COLLINS,
PRESIDING.

Mr. JUSTICE JOHNSON delivered the opinion of the court:

Jerry Connor, defendant, was charged with jumping bail in indictment No. 72-2214, armed robbery in indictment No. 70-3522, and robbery in indictment No. 72-2634. The defendant pleaded guilty to all three charges and was sentenced to a term of 3 to 5 years on each indictment, all sentences to be served concurrently.

On February 23, 1973, the defendant filed a notice of appeal from the convictions. The public defender of Cook County was appointed to represent him. Then, on August 16, 1974, the public defender filed a motion in this court for leave to withdraw as counsel pursuant to Anders v. California (1967), 386 U.S. 738, 18 L.Ed. 2d 493, 87 S.Ct. 1396. The motion states that the only possible issue presented on appeal is as follows:

Whether there was substantial compliance with Supreme Court Rule 402(a)(2) where defendant entered a negotiated plea but was not advised as to the possibility of consecutive sentences.

However, after closely scrutinizing the record, counsel concludes that there has been substantial compliance with Rule 402(a)(2). See People v. Mendoza (1971), 48 Ill. 2d 371, 270 N.E. 2d 30; People v. Reed (1971) 3 Ill. App. 3d 293, 278 N.E. 2d 524. Therefore, this appeal becomes frivolous.

Copies of the public defender's motion and brief were mailed to defendant on July 9, 1974. Defendant was advised by this court that he had until February 1, 1975 to file any points in support of his appeal, after which date the court would make a

full examination of all proceedings and decide whether the appeal is frivolous. Defendant has neither obtained new counsel nor filed any briefs in support of his appeal.

In People v. Dixon (1974), 20 Ill. App. 3d 65, 314 N.E. 2d 697, this court held that the error, if any, in failing to advise defendant, prior to the entry of his guilty plea to two counts of armed robbery, that the sentences imposed could be made to run consecutively with the sentence imposed upon the 1972 attempt armed robbery conviction did not prejudice defendant and did not require reversal, where defendant's sentences were ordered to run concurrently with that given him in 1972.

We have examined the record and concur in the opinion of the public defender that the trial court substantially complied with Rule 402. Our inspection did not disclose any additional possible grounds for an appeal which are not also frivolous. Accordingly, the public defender of Cook County is granted leave to withdraw as counsel on appeal and the judgment of the circuit court of Cook County is affirmed.

Motion allowed.
Judgment affirmed.

DIERINGER, P.J. and ADESKO, J., concur.

Abstract only.

3D
27 I.A. 73



59333

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Respondent-Appellee,	)	APPEAL FROM
)	
v.	)	CIRCUIT COURT,
)	
	)	COOK COUNTY.
)	
RAUL CASILLAS,	)	Honorable Joseph A. Power,
	)	Presiding.
Relator-Appellant.)	

Mr. PRESIDING JUSTICE DIERINGER delivered the opinion of the court:

On November 29, 1972, the petitioner, Raul Casillas filed a pro se petition for a writ of habeas corpus in the Circuit Court of Cook County. He was arrested on January 26, 1970, pled guilty to unlawful possession of a narcotic drug on June 17, 1970, and was sentenced to five years probation. On May 30, 1972, his probation was revoked, and he was sentenced to not less than one nor more than three years in the penitentiary.

The issue on appeal is whether the petitioner was denied the effective assistance of counsel.

In his petition he contended he is entitled to credit for time served on probation pursuant to Section 1005-6-4(h) of the Illinois Criminal Code (Ill. Rev. Stat., 1973, Ch. 38, § 1005-6-4(h)). He alleges that under the provisions of diminution of sentence as applied by the Department of Corrections, he would automatically be discharged after 30 months on a sentence of one to three years. He alleges the 30 months would relate back to January 26, 1970, and he should have been released on July 26, 1972.

The Public Defender of Cook County was appointed to represent him pursuant to Circuit Court Rule 17.2. At the hearing on the petition his counsel stated the claim presented in the pro se petition. The trial court granted the State's motion to dismiss the petition.

The petitioner contends he was denied the effective assistance of counsel because the record does not disclose that

counsel communicated with him prior to the proceeding to determine other possible grounds for the petition, that counsel made no effort to amend the pro se petition, and he made no argument in opposition to the motion to dismiss the petition.

Although the petitioner concedes the Habeas Corpus statute (Ill. Rev. Stat., 1971, Ch. 65) does not provide for the appointment of counsel for indigents, he argues that the standards applicable to the Post-conviction statute (Ill. Rev. Stat., 1971, Ch. 38, § 122-1 et seq.) with respect to the representation of indigents should be applied to habeas corpus petitions. Because both post-conviction and habeas corpus proceedings are typically initiated pro se, he maintains the remedies should be analogous. In the case of People v. Slaughter, (1968) 39 Ill.2d 278, relied upon by petitioner, the court stated that the post-conviction statute "cannot perform its function unless the attorney appointed to represent an indigent petitioner ascertains the basis of his complaints, shapes these complaints into appropriate legal form and presents them to the court." He also asserts the grant of counsel under Circuit Court Rule 17.2 necessarily includes the effective assistance of counsel which entitled him to more than just a pro forma presence of counsel at the hearing.

The petitioner suggests that regardless of the validity of the issues presented in the pro se petition, the effective assistance of counsel might have resulted in an amended petition raising more valid issues with a more suitable remedy. (People ex rel. Palmer v. Twomey, (1973) 53 Ill.2d 479.) In that case the Illinois Supreme Court held the Circuit Court had erred in failing to appoint counsel to represent a petitioner who filed a pro se habeas corpus petition which contained constitutional issues. The court cited the Slaughter case and stated the same lack of legal knowledge which causes a prisoner to draft an inadequate post-conviction petition might result in his selecting the wrong method of collaterally attacking his conviction. However, the court explicitly stated it did not reach the question



of whether an indigent petitioner is entitled to the appointment of counsel when his petition does not allege constitutional violations.

In the instant case the pro se petition did not disclose any constitutional issues, nor are there allegations that any such issues existed which would entitle the petitioner to representation under the standards set forth in Slaughter. Therefore, the fact the record does not disclose any instances of communication between petitioner and his appointed counsel is not determinative of the issue, and the competency of his representation on his habeas corpus petition must be determined according to the standards for trial counsel.

It is well settled that to establish the incompetence of his trial attorney, the defendant must show he suffered substantial prejudice without which the outcome would probably have been different. (People v. Smith, (1972) 7 Ill. App.3d 507.) This standard applies whether or not counsel is privately retained or court appointed. People v. Bowlin, (1971) 133 Ill. App.2d 837.

In his habeas corpus petition filed on November 29, 1972, and heard on December 13, 1972, the petitioner claimed he was being illegally imprisoned based on a Unified Code of Corrections provision which did not go into effect until January 1, 1973. Section 1008-2-4 of the Code (Ill. Rev. Stat., 1973, Ch. 38, §1008-2-4) provides that prosecutions for violations of law occurring prior to the effective date of January 1, 1973, will only be affected by the new Act if the offense being prosecuted has not reached the sentencing stage or final adjudication before the effective date. People v. Chupich, (1973) 53 Ill.2d 572.

In the instant case the petitioner is not entitled to the provisions of the Unified Code of Corrections because his case had already reached a final adjudication by January 1, 1973. The case was not then on direct appeal, and the time for filing a direct appeal had passed.

It is clear the allegations contained in the habeas corpus petition are without merit, and no amount of communication between the petitioner and his counsel could have changed the result of the hearing.

For these reasons the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

BURMAN and JOHNSON, JJ., concur.

Abstract only.

27 I.A. 74^{3D}



58759

PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff-Appellee,)
vs.)
SAMUEL AKIS,)
Defendant-Appellant.)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY.

Hon. William F. Patterson
Judge Presiding.

MR. JUSTICE ADESKO delivered the opinion of the court:

Defendant was charged with unlawful use of weapons and failure to have a State Firearm Owner's Identification card. On December 27, 1972, he was found guilty on both charges, put on one year probation and fined \$50.00. He claims on appeal that he did not knowingly and understandingly waive his right to a jury trial; that the State failed to prove him guilty beyond a reasonable doubt of knowingly carrying a loaded fire-arm in a vehicle and to have a State identification card.

On December 1, 1972, at approximately 11:00 p.m. in the vicinity of 5831 S. Normal Street, Chicago, Officer Thomas Boyd observed the defendant and two other men riding in a car driven by defendant going West on 59th Street at a high rate of speed. The officer stopped the car at 5831 S. Normal. He testified he observed defendant moving around as if reaching in his pocket and removing something and handing it to the passenger on his right and as they stopped said passenger dropped a loaded revolver on the ground. The officer recovered the gun and arrested the defendant and the passenger in the front seat, James Bates.

After advising them of their rights, the officer asked Bates where he had gotten the gun. Bates stated that he had been

given the gun by the driver of the car. The officer asked the defendant if he had State and City registration cards. The defendant answered he did not.

At the trial defendant denied that he handed a gun to Bates and that Bates dropped a gun to the ground. Bates testified that he had been drinking and did not remember seeing defendant have a gun and that he (Bates) did not drop the gun on the ground.

Let us consider the defendant's first issue presented for review- - - did the defendant knowingly and understandingly waive his right to a jury trial? Article 1, Section 13 of the Illinois Constitution provides:

"The right of trial by jury as heretofore enjoyed shall remain inviolate."

Illinois Revised Statutes, Chapter 38, Section 103-6 provides as follows:

"Every person accused of an offense shall have the right to a trial by jury unless understandingly waived by defendant in open court."

It was said many times that there is no specific hard and fast rule for determining whether a defendant knowingly and understandingly waives his right to trial by jury. It is well established that the question of whether a waiver has been understandingly made depends on the facts and circumstances of each case. People v. Wesley, 30 Ill. 2d 131, 195 N.E. 2d 708.

The record in the instant appeal shows the following:

"THE COURT: ***how do you plead to the charges?

DEFENDANT AKIS: Not guilty.

THE COURT: You want to be tried by this Court or jury?

DEFENDANT AKIS: This court.

THE COURT: Very well."

We conclude that the defendant in the instant appeal did not understandingly waive his right to a jury trial. The trial court failed to inform defendant that he had a right to a jury trial. This was the defendant's first adult offense. His previous experience with the law occurred when he was 11 years of age. In People v. Bell, 104 Ill. App. 2d 472, 482, 244 N.E. 2d 321 (1968), the court stated very appropriately:

"It takes but a few moments of a trial judge's time to directly elicit from a defendant a response indicating that he understands that he is entitled to a jury, that he understands what a jury trial is, and whether or not he wishes to be tried by the court without a jury. This simple procedure incorporated in the record will reduce the countless contentions raised in the reviewing courts about jury waivers."

As to the question whether the State proved defendant guilty of knowingly carrying a loaded firearm in a vehicle, the police officer testified that the only person he actually saw with the gun was the passenger. The officer stated earlier that he saw the defendant making motions as though he were reaching into his pocket and handing something to the passenger. It was cold and the defroster did not work and the windows were fogged. The defendant testified that he could not see out the back window at all. The officer when asked by the court stated that although he could remember looking into the car, he could not remember the condition of the windows and that they might have been fogged. Thus it appears that there is a reasonable doubt of the accuracy of the officer's observation and therefore there is a reasonable doubt as to the charge of the defendant's carrying the weapon in the vehicle.

Since there is this doubt of defendant's carrying a weapon in the vehicle, obviously there was no necessity for him to have

a firearm owner's identification card. Thus there was no proof beyond a reasonable doubt that defendant needed a Firearm Owner's Identification Card.

For the reasons stated above, we conclude that the trial court's judgment be reversed.

JUDGMENT REVERSED

DIERINGER, P.J., and JOHNSON, J., concur.
(Abstract Only)

27 I.A. 99



No. 60181

PEOPLE OF THE STATE OF ILLINOIS,))
Plaintiff-Appellee,))
v.))
PETER L. MARTIN,))
Defendant-Appellant.))

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

HONORABLE
JAMES M. BAILEY,
PRESIDING.

PER CURIAM (First District, Fifth Division)

BEFORE Barrett, P.J., Lorenz and Sullivan, JJ.

After a jury trial, defendant was found guilty of the offense of burglary in violation of section 19-1 of the Criminal Code. (Ill. Rev. Stat. 1971, ch. 38, par. 19-1.) He was sentenced to a term of not less than three years nor more than twelve years.

He appeals contending that: (1) he was not proven guilty beyond a reasonable doubt because of insufficient identification, and (2) he was denied a fair trial because the State's Attorney made improper and prejudicial arguments during closing rebuttal argument.

The following evidence pertinent to the appeal was adduced.

Carrier Bender for the State

She is a registered nurse and works at Little Company of Mary Hospital. She and her husband Nathaniel own a single family home at 9255 S. Loomis Avenue, Chicago. On March 13, 1973, after her husband left for work, she left home between 9:00 and 9:30 a.m. to go to work. She made certain all the doors and windows were locked. There were no broken windows then. She nor her husband gave anyone permission to enter their home while they were gone.

When she returned home between 1:00 and 1:30 p.m. she noticed that there was broken glass all over the back platform leading from the back door, which had been broken into. The window was broken; the locks were broken on the inner door and everything was disarranged in the back room where her husband had been working with his tools and building materials; there were no curtains on the

windows in the rear room when she left that morning, so that one had a clear view into the back room. On cross-examination, she testified that there is a back yard with shrubbery five or six feet high around the east side of the property. There were no newspapers over the windows in the back room; there was nothing on the windows; and that no curtains or drapes had been installed. To her knowledge nothing was taken from her home.

Paul Smajo on behalf of the State

He was a police officer for the City of Chicago. On March 13, 1973, at approximately 10:45 a.m. he and his partner, Officer Ronald Nottelmann, were riding in a marked police vehicle in the vicinity of 93rd and Ada when they received a radio call of a robbery in progress at 9255 South Loomis, Chicago, only a block away from the location where they received the call. Nottelmann was driving and he was in the front passenger seat. He got out of the squad car at the entrance of the alley and noticed two male Negroes running by a window of the back porch of the home. At that time he was approximately 25 feet away from the porch. He ran north in the alley behind the home and observed two male Negroes exiting the rear door of the enclosed back porch. He identified defendant as one of the individuals he saw exiting the door on March 13, 1973, at 9255 South Loomis. At the time the individuals left the home, Nottelmann was at the west end of the home and he was at the east end and the two individuals were standing between them. One man jumped the fence and fled north, while the other man, the defendant, ran several steps east toward him and then ran south into the yard, at which time he entered the yard and apprehended defendant who was the same individual he saw exiting the door. A short time later the other man, who had jumped the fence, was apprehended with an assist from a task force unit, approximately 100 feet north and down the alley. He later returned to the premises, inspected the area and found that the glass in the outer door was broken; that the second door, which would be the one entering into

the home, also had broken glass. None of the occupants of the premises were home. The other individual who was apprehended was identified as Warren Ward.

He made out a police report. On objection by the State, counsel for defendant was not permitted to ask Smajo whether the police report mentioned he viewed individuals through a window. On redirect examination, he testified that the police report is only a summarization of an event and did not contain his "observations of seeing figures inside the building." The police report was not introduced in evidence. He searched defendant and found no weapon or burglary tools in his possession.

Police Officer Ronald C. Nottelmann for the State

He substantiated the testimony of Smajo. He identified defendant in court. He saw Smajo in the process of putting handcuffs on defendant; and that then Smajo turned defendant over to him and he put defendant in the squad car.

Winnie Shaw for the State

She lived at 9256 Ada Street, which is across the alley from 9255 South Loomis; that from her window she was able to see the residence at 9255 South Loomis. At approximately 10:30 a.m. on March 13, 1973, she saw two men walk around to the back of the house at 9255 South Loomis; that one man took off his jacket, wrapped it around his arm, broke the window and then both men went inside the premises; that she called the police. She then returned to her window and saw the two men running out of the house; that one ran north down the alley and the other one came out from the front of the house and just as he was trying to jump over the fence the police grabbed him; that the man she saw run from the house was the same man who was arrested by the police. On cross-examination she testified that defendant is the nephew of Mrs. Flowers, who lives across the street at 9300 Ada. She did not identify defendant at the trial as a participant in the burglary.

Jewel Flowers on behalf of defendant

She resided at 9300 South Ada; that on March 13, 1973, at approximately 10:00 a.m. to 10:30 a.m. she was at home. Defendant, her nephew, was at her home all morning on March 13, 1973. She did not remember the exact time that he left, but that afterwards she looked out the window and noticed the police car. She was familiar with the rear of the house at 9255 South Loomis; and that on March 13, 1973, there was a newspaper in the window in the rear portion of the home.

Defendant on his own behalf

He was 21 years old, lived with his mother at 8738 South Merrill, Chicago, and that he is in his third year in high school at Lindbloom. During the morning hours of March 13, 1973, he was at 9300 South Ada, Chicago, the home of his aunt, Jewel Flowers. He had spent the night there and left during the morning hours of March 13th to go to his girl friend's house and then to the liquor store, but he did not know the exact time. When he got to the corner of 93rd and Loomis a police car drove up and a policeman jumped out with his gun drawn; that at the time he was walking towards 89th and Loomis; that he asked the policeman what he wanted, but the police put some handcuffs on him, patted him down and threw him in the car. He did not break into the residence at 9255 South Loomis. He knew a man later identified as Warren Ward, but did not know his name. The first time he ever saw Warren Ward was on the 13th at the police station. When he left 9300 South Ada on March 13, 1973, Mrs. Flowers, Johnny, Wayne, Andre and Eleonore and her baby were there.

Officer Smajo recalled for rebuttal

During his investigation of the burglary at 9255 South Loomis, he spoke to Mrs. Shaw at 9257 South Ada. He also went to the house at 9300 South Ada; knocked on the door, but there was no response. Mrs. Shaw told him she was the person who called the police.

OPINION

Defendant contends that he was not proven guilty beyond a reasonable doubt of the crime of burglary, because the only proof offered at trial which directly linked defendant to the crime was that of Police Officer Smajo; and that Smajo's testimony was impeached by his failure to include in the police report that he observed defendant run by a window of the back porch and exit the rear door of the enclosed back porch. In the police report there was no mention of Smajo's observation of viewing the two men through a window. However, Smajo testified that the police report was merely a summarization of an event and did not necessarily contain all of the facts pertaining to the incident.

The omission in the police report that Smajo observed individuals through a window of the house does not impeach or nullify his testimony at the trial that he observed "two male Negroes running by a window of the back porch of the home." At most, the fact that this statement was omitted from the police report raises a question as to the credibility of the witness. In a jury trial, the credibility of a witness is for the jury to determine and its determination will not be disturbed unless it is based upon evidence which is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt. (People v. Ellis, 53 Ill. 2d 390, 395, 292 N.E.2d 728, 730; People v. Riles, 10 Ill. App. 3d 772, 295 N.E.2d 234; People v. Smith, 20 Ill. App. 3d 756, 314 N.E.2d 543.) Here, the jury chose to believe the testimony of Smajo and from a review of the entire record it cannot be said that the jury's determination was erroneous.

Further, there is sufficient other evidence in the record to sustain the conviction of defendant. Mrs. Winnie Shaw testified that she saw two male Negroes break into the Bender home and observed the same two men leave the home and watched Smajo arrest one of them, whom police officers Smajo and Nottelmann identified as defendant. Nottelmann testified that he saw Smajo putting handcuffs on defendant; and that then Smajo turned defendant over to Nottelmann, who put

defendant in the squad car. From a review of the entire record, it cannot be said that defendant was not proven guilty beyond a reasonable doubt.

Defendant also contends that statements made by the prosecutor in closing arguments denied him a fair jury trial. However, counsel for defendant did not object to the statements in the trial court. The rule is well established that the failure to object to alleged improper closing argument waives any error therein for purposes of appeal. (People v. Kurzydlo, 23 Ill. App. 3d 791, 320 N.E.2d 80; People v. Graham, 2 Ill. App.3d 1022, 279 N.E.2d 41.) Further, an examination of the prosecutor's statement clearly shows that it was not prejudicial to defendant. During the closing argument in rebuttal, the prosecutor made the following comments:

What about Mrs. Shaw? Is Mrs. Shaw, the woman who came here today, is she involved in this conspiracy that counsel would have you believe, this conspiracy to convict Peter Martin? Does she have any reason to lie? Do the officers have any reason to lie? Does the police officer who is working in the City of Chicago, who risks his life every day to protect us, does he have any reason to come in and lie to you today?

Counsel wants to make you think that because that is his only hope. Because if you find the defendant not guilty and that is what you have got to do, the decision that you have to come to is that those police officers are both liars. They can't be mistaken. They have to be liars. They would have had to perjure themselves from the stand. That is a decision he is asking you to make.

He is also asking you to say the same thing about Mrs. Shaw. Well, let's not, ladies and gentlemen. I think you feel the same way.

A similar closing argument was made in People v. Oden and Clay, No. 59578, Fourth Division, opinion February 13, 1975. There, the prosecuting attorney said during closing argument:

The defense in his case says, and even admits, the defendants concede the description fits these men. I think that would establish the case that we have beyond a reasonable doubt. It is inconceivable to me, to the People, this woman would fabricate this type of story, if we

are to assume it is a story, as was indicated before. What reason would she possibly have? When we call witnesses to the stand to testify, we vouch for their credibility. The People are saying in essence, that person is telling the truth and you should believe her.

Defendants contended that the comment was a prejudicial, personal statement as to the credibility of the complaining witness, and the prosecutor's personal opinion of defendants' guilt. The court, in rejecting the contention of the defendants, said (Slip Opinion, p.4):

We do not agree with the defendants' contention. It is well settled that in closing argument to the jury, a prosecutor may discuss the witnesses and their credibility. (United States v. Cotter, [1970] 425 F.2d 450.) In the instant case, the prosecuting attorney merely commented on the credibility of the complaining witness. No personal comment or highly personal argument appears in the record. The defendants were not prejudiced by the prosecutor's closing remarks.

Likewise, in the case at bar, the prosecuting attorney merely commented on the credibility of the State's witnesses. Defendant was not prejudiced by the prosecutor's closing remarks.

For the reasons stated above, we affirm the judgment of the circuit court.

Affirmed.

[PUBLISH ABSTRACT ONLY.]

3D
27 I.A. 101



60110

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,)	
)	
v.)	
)	
JERIMIAH TOWNSEND,	)	HONORABLE
	)	EARL J. NEAL,
Defendant-Appellant.)	)	PRESIDING.

MR. JUSTICE DRUCKER delivered the opinion of the court:

Defendant was charged in three separate complaints with criminal damage to property (Ill. Rev. Stat. 1973, ch. 38, par. 21-1(a)) in that on September 12, 1973, September 15, 1973, and October 29, 1973, he knowingly damaged the glass windows of the 34th Ward Democratic Organization without their consent. Following a bench trial defendant was found guilty and sentenced to a term of one year probation on each charge, the sentences to run concurrently, and according to the notice of appeal ordered to pay restitution in the amount of \$800. Defendant appeals arguing that the evidence is insufficient to establish his guilt beyond a reasonable doubt, and that there was a fatal variance or failure of proof concerning ownership and identity of the property damaged.

At trial Morgan Mitchum, a Chicago police officer, testified for the State that on September 12, 1973, he viewed the 34th Ward Democratic Organization Headquarters at 10906 South Halsted Street, Chicago, Illinois. At that time the windows in the front of the premises had been broken and were boarded up. Officer Mitchum testified that the windows were subsequently replaced. On September 15, 1973, he again viewed the premises and found that the windows were again broken and had been boarded up. Officer Mitchum testified that the windows were again replaced and on October 29, 1973, were again broken.

William Monroe testified that he is a precinct captain in

the 34th Ward Democratic Organization and is regularly in their headquarters located at 10906 South Halsted, Chicago, Illinois. He testified that he did not at any time give defendant permission to damage the property on those premises nor to his knowledge did anybody else in the organization give defendant such permission. Monroe testified that while working as a bailiff in Branch 54 of the circuit court of Cook County in the latter part of September 1973, he had a conversation with defendant, who was in custody on other charges. The assistant State's attorney asked Monroe:

"Q. . . . [D]id that conversation have anything to do with the charges before this Court today?

A. I asked him [defendant] if he had broken out the windows.

Q. And what was his answer?

A. His answer was yes.

Q. Did he specifically relate that to the charges before the Court?

A. He didn't state any dates or time, they had only been broken out twice."

Part of the cross-examination of Monroe follows:

"MISS ESSARY (for defendant): Would you state again specifically what Mr. Townsend said to you?

A. Well, I asked him if he broke out the windows at the 34th ward office.

Q. Are you sure you mentioned the name of the organization?

A. Oh, yes.

Q. And what did he say?

A. He said, yes.

Q. And was that the extent of the conversation?

A. Well, I asked him, why.

THE COURT: What was his answer sir?

A. He said he wanted to get the alderman's attention."

Defendant testified that he did not break the windows of the 34th Ward Democratic Organization Headquarters. He admitted that he had a conversation with Monroe in the latter part of September in which he told Monroe that he had broken windows at the University of Illinois Circle Campus. Defendant denied ever telling Monroe that he had broken the windows of the 34th Ward Democratic Organization Headquarters.

Opinion

The State in its brief concedes that it failed to prove defendant guilty beyond a reasonable doubt of the October 29 charge. After a review of the record, we concur. Accordingly defendant's conviction on this charge is reversed.

The evidence adduced at trial impels a strong suspicion that defendant at some time broke windows at the 34th Ward Democratic Headquarters. However, the existence of even a strong possibility of defendant's guilt, amounting perhaps to a probability, is insufficient to sustain a conviction; the State was required to prove him guilty beyond a reasonable doubt of the offenses with which he was charged. (See People v. Jackson, 23 Ill.2d 360, 178 N.E.2d 320.) As the Supreme Court held in People v. Miller, 315 Ill. 411, 416, 146 N.E. 501:

"It may be highly probable [defendant] committed some crime for which he should be punished, but his guilt . . . should be proved beyond a reasonable doubt. Even bad men cannot be convicted and imprisoned on general principles."

We believe that the State failed to sufficiently link defendant to the specific offenses with which he was charged - the September 12 and September 15 window breakings. The State's proof consisted merely of the testimony of Officer Mitchum that he observed that the windows of the 34th Ward Democratic Headquarters were broken on these dates and the testimony of Monroe concerning his conversation with defendant in late September while the latter was in custody on an unrelated window breaking charge. Monroe's account of defendant's statement amounts at best to an imprecise admission to an unspecified offense. Indeed, Monroe's testimony while under direct examination seems to link the statement to the University of Illinois incident. Furthermore, even if defendant's statement is considered to have conclusively demonstrated

that he, at some time, broke the 34th Ward Democratic Headquarters' windows, there is nothing in the record to indicate that he was referring to his activities on September 12 and September 15.

For the foregoing reasons we hold that the State failed to prove defendant guilty beyond a reasonable doubt of the three offenses with which he was charged. Therefore, we reverse the judgments of conviction and the restitution order entered against him. .

REVERSED.

Lorenz and Sullivan, JJ., concur.

Abstract.

Bar Assn.

3D
27 I.A. 102



No. 60055

PEOPLE OF THE STATE OF ILLINOIS,))
Plaintiff-Appellee,))
v.))
HERBERT B. MOORE (Impleaded),))
Defendant-Appellant.))

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

HONORABLE
PHILLIP ROMITI,
PRESIDING.

PER CURIAM: (First District, Fifth Division)
BEFORE BARRETT, P.J., LORENZ and SULLIVAN, JJ.

Following a bench trial, defendant was found guilty of the crime of burglary (Ill. Rev. Stat. 1973, ch. 38, par. 19-1.) and was sentenced to a term of two to six years. He appeals contending that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

At trial the following evidence pertinent to this appeal was adduced.

Thomas Brooks for the State:

He is a Chicago Police Officer. On February 13, 1973, at 4:55 a.m. he and his partner Officer Mustari were on routine patrol when they observed three male Negroes in a doorway three addresses east of 1649 E. 71st Street. They circled the block and were eastbound on 71st Street when he noticed the window of the Playground Lounge at 1649 E. 71st Street was broken and two men were inside the place. He noticed that the three men he had previously seen in the doorway were gone. He and his partner got out of their squad car and upon looking inside the lounge saw one man standing in the rear of the tavern near a juke box and another close to the window near a cigarette machine. As they approached and announced their office, the men inside came through the broken window fleeing one to the east and one to the west. Officer Mustari apprehended Willie G. Rogers while the witness chased defendant Moore down the street and through an alley.

During the chase, he identified himself as a police officer and fired two warning shots. After defendant jumped a fence he ordered

him to stop and upon his failure to do so, he fired one more shot at him. Defendant stumbled and was then apprehended. The witness placed him under arrest and when he found defendant to be wounded, called for the wagon and had him transported to the hospital. Defendant had alcohol on his breath, spoke coherently but had no stolen property in his possession.

Virginia Robinson for the State:

She is the operator of the Playground Lounge at 1649 East 71st Street, Chicago, Illinois. On February 13, 1973, she closed the lounge at 2:00 a.m. Pursuant to a police call she returned to the lounge later that morning and found that the front window had been broken. One hundred and fifty bottles of liquor and some money from the juke box were missing from the lounge.

Willie G. Rogers on his own behalf:

On February 12, 1973, at approximately 8:00 p.m., defendant Moore came to his home where they consumed a fifth of vodka. At 10:00 p.m. they took a cab to Moore's home where they consumed a second fifth of vodka. At 3:30 or 4:00 a.m., they left Moore's home and took a cab to 71st and Stony Island to find an open lounge. As they got to the Playground Lounge they found that the front window had been broken out. They entered the lounge to see if they could get a drink. Upon noticing a car approach the premises they ran. After the police officers announced their office, he immediately stopped and put his hands up against the wall. He was able to walk and to talk in a coherent manner on the evening in question.

It was stipulated that on February 13, 1973, a mobile unit of the Chicago Police Department Crime Laboratory went to the premises at 1649 East 71st Street, Chicago, Illinois. Their examination did not reveal any fingerprints which compared to either of the defendants.

OPINION

Defendant's only argument on appeal is that the State failed to establish his guilt beyond a reasonable doubt since the evidence demonstrated that he was intoxicated at the time of the offense and was,

therefore, unable to form the necessary intent. Defendant was charged with burglary in that he had knowingly and without authority entered the Playground Lounge "with the intent to commit the crime of theft therein" in violation of section 19-1 of the Criminal Code. (Ill. Rev. Stat. 1973, ch. 38, par. 19-1.) The law is clear that a person who is voluntarily intoxicated is still criminally responsible for his conduct unless he is intoxicated to the degree that it negates the existence of a mental state which is an element of the offense. (Ill. Rev. Stat. 1973, ch. 38, par. 6-3.) In a bench trial, the question of whether the defendant was intoxicated to the extreme that his power to reason was entirely suspended and that he was thereby rendered incapable of forming the intent required for the crime of burglary, is a question of fact to be determined by the trial judge. People v. Hunter, 14 Ill. App. 3d 879, 303 N.E.2d 482.

In the case at bar, the evidence established that at 4:55 a.m. defendant and Willie Rogers were both found inside the Playground Lounge, the front window of which had been broken. Upon seeing the officers approach both men fled. Defendant Moore led Officer Brooks on a chase down the street, through an alley and over a fence. The chase was only terminated by the defendant's inability to run faster because he suffered a bullet wound inflicted by his pursuer. Moore's actions demonstrated the presence of mind to attempt to elude arrest by the police officers including a lengthy chase. In addition, Officer Brooks testified that Moore was able to walk and speak coherently after being placed under arrest. Moore now argues that the testimony of Willie Rogers established that he had consumed approximately a fifth of vodka on the evening of February 12th and the early morning hours of February 13th prior to entering the lounge. Rogers testified that he had consumed as much alcohol as did Moore. At trial Rogers was able to recall in detail all the events which occurred on the evening in question. Rogers' recollection would certainly not indicate that his intoxication was to such an extreme that he could not form the prerequisite test.

Under these circumstances, we conclude that the trial judge was fully justified in finding that defendant Moore was capable of forming the prerequisite intent to commit the crime of burglary.

The judgment of the circuit court is affirmed.

Affirmed.

[PUBLISH ABSTRACT ONLY.]

3D
27 I.A. 103



59664

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
ex rel PAUL DeMARIO,	)	CIRCUIT COURT OF
	)	COOK COUNTY.
Relator-Appellant,)	
)	
v.)	_____
)	
JOHN J. TWOMEY, Superintendent,)	
Illinois State Penitentiary,)	
Joliet, Illinois,	)	HONORABLE
	)	JOSEPH A. POWER,
Respondent-Appellee.	)	JUDGE PRESIDING.

Before BARRETT, P.J., DRUCKER, J. and LORENZ, J.
PER CURIAM, FIRST DISTRICT, FIFTH DIVISION.

Petitioner was convicted of murder on December 6, 1965, and sentenced to a term of 15 to 30 years. He filed a petition for writ of habeas corpus and on May 17, 1973, the state moved to dismiss on the basis that petitioner had failed to allege any of the grounds for discharge from custody enumerated in the Habeas Corpus Act. (Ill. Rev. Stat. 1972, ch. 65, par. 22.) Following a hearing on August 14, 1973, the motion to dismiss was granted.

The Cook County Public Defender, who was appointed to represent petitioner on appeal, has filed a motion for leave to withdraw. An Anders brief has been filed in support of the motion stating that the only possible issue on appeal would be whether the petitioner was entitled to habeas corpus relief and whether petitioner would be entitled to the benefits of the Code of Corrections which took effect in 1973. The Public Defender's conclusion is that appeal on these issues would be "without merit and could not possibly be successful."

Petitioner was served with a copy of the motion and brief by mail on November 12, 1974. In addition, on November 25, 1974, we advised petitioner of the petition for leave to withdraw and informed him that he had until January 24, 1975, to file any additional points he might choose in support of his appeal. He has not responded.

The original petition filed by defendant stated that on December 6, 1965, he was convicted after trial by jury of murder and sentenced to a term of 15 to 30 years; that he was accused, along with a co-defendant, of having robbed a Mr. Baird of \$100 in cash and of inflicting blows resulting in Baird's death by heart attack ten days later. Petitioner contended that the provisions of the Unified Code of Corrections applied to his case and that his sentence should be reduced to the "1 to 3 ratio" recommended by the American Bar Association. He also cited People v. Bailey, 56 Ill.App.2d 261, 205 N.E.2d 756, to support his request that his case be reopened, that evidence be heard, that the case be remanded with directions to enter a finding of guilty of involuntary manslaughter instead of murder, and that an appropriate sentence be entered in accordance with the new code. In his notice of filing served upon the State's Attorney, he asked, in the alternative, that the petition for relief under the Habeas Corpus Act be treated as a petition under the Post-Conviction Hearing Act.

Matters of a nonjurisdictional nature are not cognizable in a proceeding for a writ of habeas corpus. (People ex rel Jefferson v. Brantley, 44 Ill.2d 31, 34, 253 N.E.2d 378.) It is only when the original conviction was void or when something has occurred since its rendition which would entitle the prisoner to release, that the court has jurisdiction to entertain such a writ. The document which the petitioner filed contains no allegation that could be construed as jurisdictional in nature and the trial court was therefore correct in dismissing the petition.

It has been held that an inartfully drawn pro se petition for a writ of habeas corpus may properly be treated as a request for relief under the Post-Conviction Hearing Act. (Ill. Rev. Stat. 1971, ch. 38, par. 122-1 et seq; People ex rel Palmer v.

Twomey, 53 Ill.2d 479, 292 N.E.2d 379.) Since petitioner's case was not pending on direct appeal on January 1, 1973, when the new code took effect, the provisions of the Unified Code of Corrections do not apply to him. (People v. Harvey, 53 Ill. 2d 585, 294 N.E.2d 269.) Even if the code did apply to petitioner, the provision upon which he relies, Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-1(c) (3) and (4), does not apply to murder, a Class 1 felony. Consequently, even if the petition were to fall under the scope of the Illinois Post-Conviction Hearing Act, he would not be entitled to any reduction in his sentence. Furthermore, the question of excessiveness of sentence is not properly subject to adjudication in a post-conviction proceeding. People v. Ballinger, 53 Ill.2d 388, 292 N.E.2d 400.

We have examined the record and agree with the Public Defender that none of the arguments raised by petitioner has substantial merit.

For the reasons stated above, we grant the Public Defender leave to withdraw and affirm the judgment of the trial court.

AFFIRMED.

PUBLISH ABSTRACT ONLY.



60524

IN THE MATTER OF SOPHIE WISNIEWSKI.) APPEAL FROM CIRCUIT
) COURT OF COOK COUNTY.
)
)
(PEOPLE OF THE STATE OF ILLINOIS,)
)
Petitioner-Appellee,)
)
v.)
)
SOPHIE WISNIEWSKI,) HONORABLE
) LAWRENCE I. GENESEN,
Respondent-Appellant.)) PRESIDING.

MR. JUSTICE DRUCKER delivered the opinion of the court:

Respondent appeals from an order finding her in need of mental treatment and placing her in the custody of the Department of Mental Health with authority to commit her to the Tinley Park Mental Health Center.

On appeal respondent contends (1) that the State did not prove by clear and convincing evidence that she was in need of mental treatment; and (2) that respondent was denied due process of law because the standard of proof for a person in need of mental treatment should be proof beyond a reasonable doubt.

On April 2, 1974, Frank Wisniewski signed a petition asserting that respondent, his mother, was in need of mental treatment. He alleged that she had threatened her neighbors with a knife and had threatened to burn a building, and that the landlord of 3428 Baltimore Avenue, Chicago, Illinois, witnessed these acts. Attached to the petition was a certificate of need for hospitalization executed by Dr. J. Barrera. Dr. Tai Park certified that he examined the respondent on April 4, 1974; that she was in need of mental treatment; and that respondent should be admitted to a hospital immediately as an emergency for the protection from physical harm to herself or others.

A hearing was held on April 5, 1974. Colette Klyczek, respondent's daughter, testified that her mother did not seem to get along with people but that within three or four months immediately prior to the hearing she had not observed her mother

intentionally or unintentionally strike or injure anyone. On questioning by the trial court Mrs. Klyczek stated that respondent had been in a mental institution at least four other times, the last being in 1966. She further stated that prior to that hospitalization, she had seen her mother act in an aggressive manner.

Dr. J. Barrera did not testify. Dr. Tai Park, the other examining psychiatrist, testified that he had examined respondent on April 4, 1974. He said she was a widow, 57 years old, who was admitted to Tinley Park Mental Center on April 1, 1974, as an emergency patient; that he found her to be well oriented as to time, place and person, but her effect was not consistent with the subject of conversation; that she talked of many murders and dead in her family; and that while she was making these statements her effect was kind of bright or smiley which was not consistent with what she was talking about.

The doctor further stated that respondent had delusions that her landlady was a Nazi and Satan incarnated and that her landlady and another tenant were trying to kill respondent. The doctor found that respondent presented the symptoms of schizophrenia, paranoid type, and that her delusion, if acted upon, could be dangerous to others and herself. On cross-examination Dr. Park said he examined respondent for a period of about 50 minutes, and that she was able to take care of herself.

The State rested and counsel for respondent made a motion for a directed verdict on the grounds that there was no clear and convincing evidence that respondent was liable to injure herself or anyone else. The motion was denied.

Respondent testified that she believed her landlady's son had been murdered; that the woman who lived across the hall was armed with a hatchet and an axe, and each time respondent opened her door her neighbor would appear with a hatchet and an axe in her hand.

At the close of the respondent's testimony the trial court suggested that the State call respondent's son as a witness.

Frank Wisniewski, son of respondent, testified that when he had recently gone to his mother's apartment with the police officers in order to take her to the clinic for examination, she tried to pick up a knife from the sink to put it in her purse, but the police saw that and stopped her.

At this point respondent interrupted and stated that she had a knife near the door for protection at night; that "I put a knife in the door when we were leaving after the two police came."

On cross-examination Wisniewski said he did not personally observe his mother pick up the knife from the table, but he saw the police take it away from her, and that about ten years ago his mother threw a pot of scalding water on his father. Respondent again interrupted and stated it was in self-defense.

Dr. Park was recalled and stated it was his opinion that if respondent feels that the lady across the hall is against her and plotting with her landlady, then there is a possibility that she might attack them.

The trial court found that respondent was in need of mental treatment. She was released by the Department of Mental Health to Tinley Park Mental Health Center.

Notice of appeal was filed on April 23, 1974. On May 7, 1974, the Tinley Park Mental Health Center filed a notice with the clerk of the circuit court stating that on April 26, 1974, respondent received an absolute discharge.

Respondent argues that she was denied due process of law because the trial court's determination of her need for mental treatment was governed by the standard of proof requiring clear and convincing evidence rather than by proof beyond a reasonable

doubt. However, this issue was not argued in the trial court and, therefore, it cannot be raised for the first time on appeal. (People v. Amerman, 50 Ill.2d 196, 279 N.E.2d 353.) Further, it has been held that the State must prove that an individual is in need of mental treatment by clear and convincing evidence and not by proof beyond a reasonable doubt. People v. Sansone, 18 Ill. App.3d 315, 309 N.E.2d 733, leave to appeal denied 56 Ill.2d 584; People v. Bradley, 22 Ill. App.3d 1076, 318 N.E.2d 267; In re Sciara, 21 Ill. App.3d 889, 316 N.E.2d 153.*

Respondent also argues that there was no clear and convincing evidence that respondent was in need of mental treatment.

Section 1-11 of the Mental Health Code (Ill. Rev. Stat. 1973, ch. 91-1/2, par. 1-11) provides as follows:

"'Person In Need of Mental Treatment,' when used in this Act, means any person afflicted with a mental disorder, not including a person who is mentally retarded, as defined in this Act, if that person, as a result of such mental disorder, is reasonably expected at the time the determination is being made or within a reasonable time thereafter to intentionally or unintentionally physically injure himself or other persons, or is unable to care for himself so as to guard himself from physical injury or to provide for his own physical needs. This term does not include a person whose mental processes have merely been weakened or impaired by reason of advanced years."

* The State has asked leave to cite People v. Pembrock, 23 Ill. App.3d 991, 320 N.E.2d 470, where this court held that in proceedings brought pursuant to the Sexually Dangerous Persons Act (Ill. Rev. Stat. 1971, ch. 38, par. 105-1 et seq.) the People must establish their case beyond a reasonable doubt. The State asserts a petition for leave to appeal to the Illinois Supreme Court is being prepared. The question of the standard of proof in proceedings under the Sexually Dangerous Persons Act has no bearing on the fact that the courts have held that the standard of proof of "clear and convincing evidence" should be applied to proceedings under the Mental Health Code. See Sansone; Bradley; Sciara.

In the case at bar there was sufficient clear and convincing evidence to establish that respondent was afflicted with mental illness. Dr. Park testified respondent "is schizophrenia, paranoid type." Both he and Dr. J. Barrera, in their certificates of need for hospitalization, gave opinions that respondent was in need of mental treatment. However, there is no clear and convincing evidence that respondent was "reasonably expected to intentionally or unintentionally physically injure" herself or others. Cf. Sciara; see also Bradley.

Respondent argues that there was no evidence introduced to sustain the allegation in the petition that she threatened her neighbors and threatened to burn the building. These acts were supposedly witnessed by her landlady, who was not identified and who did not testify.

Dr. Park testified that as a result of his examination he was of the opinion respondent had delusions of killing, murder and homicide, and "if her delusions is [sic] acted out she can be dangerous to others and herself." However, this opinion was later modified when the doctor stated, "I'm not saying that she -- she is going to do it, I'm not saying that, but, there is always a possibility." Dr. Park also testified that at the time of the examination respondent was "well oriented as to time, place and person" and that she was able to take care of herself. Further, the incidents upon which Dr. Park based his opinion were past events and do not establish that respondent was "reasonably expected at the time the determination [was] being made or within a reasonable time thereafter to intentionally or unintentionally physically injure herself or other persons" as required by Section 1-11 of the Mental Health Code. (Bradley.) Proof that respondent was not in need of medical treatment under Section 1-11 of the Mental Health Code is substantiated by the

fact that she received an absolute discharge on April 26, 1974, only 21 days after the order of commitment was entered on April 5, 1974.

The case at bar is devoid of clear and convincing proof that at the time of the hearing respondent was in need of medical treatment because she would intentionally or unintentionally physically injure herself or other persons, and therefore the judgment of the trial court is reversed.

REVERSED.

Lorenz and Sullivan, JJ., concur.

Abstract.

3D
271.A. 105



No. 60767

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,)
)
 v.)
)
LEE HAMPTON,)
)
 Defendant-Appellant.)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

HONORABLE
ROBERT J. COLLINS,
PRESIDING.

PER CURIAM (First District, Fifth Division):

BEFORE Barrett, P.J., Lorenz and Sullivan, JJ.

Defendant was found guilty after a bench trial of the crime of attempt rape. (Ill. Rev. Stat. 1973, ch. 38, par. 8-4.) He was sentenced to a term of five to fifteen years.

Defendant wished to appeal and counsel was appointed to represent him. After examining the record, defense counsel has filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, a brief in support of the motion has also been filed. The brief states that the only possible arguments which could be raised on appeal are: (1) that the evidence was insufficient to establish defendant's guilt beyond a reasonable doubt, (2) that trial counsel was incompetent in that he failed to call a material defense witness, and (3) that defendant's sentence is excessive. The brief concludes that an appeal on these issues would be wholly frivolous and without merit. Defendant was mailed copies of the motion and brief on October 22, 1974, and was informed that he had until December 21, 1974, to file any additional points he might choose in support of his appeal. Defendant was granted an extension of time in which to file his response until February 21, 1975. He has not responded.

The motion and brief of the public defender state the first possible argument which could be raised on appeal is that the evidence was insufficient to establish defendant's guilt beyond a

reasonable doubt. The rule is well established that in a bench trial it is the responsibility of the trial judge to determine the credibility of witnesses and the weight to be given to their testimony. Only where the evidence is so unsatisfactory as to raise a reasonable doubt of defendant's guilt will the findings of the trial court be disturbed. People v. Clark, 52 Ill. 2d 374, 288 N.E.2d 363; People v. Holmes, 6 Ill. App. 3d 254, 285 N.E.2d 561.

In the case at bar, the State's evidence was overwhelming. The victim, age 70, testified that during the evening hours of November 23, 1973, she walked into the building where she lived, when defendant came up behind her. Defendant pulled her down some stairs, pulled off her underclothing and attempted to rape her, while she cried out for help. When the police officers arrived on the scene, the defendant fled. A short time later she saw the defendant as the police officers were taking him to the squad car.

Chicago police officer Drummond corroborated the testimony of the victim. He testified that on November 23, 1973, he responded to a call and proceeded to the victim's building. Upon his arrival he saw the defendant running out of a gangway. He gave chase and arrested the defendant a short distance away; that while he was taking the defendant to the squad car, the victim identified him as the man who had attacked her; that the victim's clothing was disarranged and she had scratches on her hands and a dark spot on her face.

The testimony of the victim was positive, credible and alone was sufficient to establish defendant's guilt beyond a reasonable doubt. (People v. Halteman, 10 Ill. 2d 74, 293 N.E.2d 341.) In addition, her testimony was substantially corroborated by that of Officer Drummond. The defendant's trial testimony in which he denied committing the crime did not create a reasonable doubt as to his guilt, since a trial judge is not obliged to believe a defendant's testimony. (People v. Kaprelian, 6 Ill. App. 3d 1066, 286 N.E.2d 613.) After a complete review of the entire record, we conclude that the

evidence was sufficient to establish defendant's guilt beyond a reasonable doubt.

The second possible argument which could be raised on appeal is that defendant's trial counsel was incompetent in that he failed to call a material defense witness, i.e., the defendant's girl friend, who was allegedly waiting for defendant in his car at the time he was placed under arrest. To establish incompetency of appointed counsel a defendant must establish actual incompetency of counsel as reflected in the manner in carrying out his duties and substantial prejudice resulting from such incompetency without which the outcome would probably be different. People v. Georger, 38 Ill. 2d 165, 230 N.E.2d 851; People v. Dudley, 46 Ill. 2d 305, 263 N.E.2d 1.

An examination of the record reflects that when defendant's case was called for trial, the public defender representing defendant informed the trial judge that he had interviewed the defendant and that he was not prepared to proceed with trial at that time. The defendant in open court demanded immediate trial over his counsel's recommendation. After defendant waived his right to a trial by jury, the trial was commenced. At that time defendant did not in any way suggest that he needed time to secure a defense witness who was not present in court despite the fact that his trial testimony demonstrated that he was aware of the witness. The defendant cannot now complain that his trial counsel was incompetent in that he had failed to call a material defense witness when the defendant himself demanded immediate trial and ignored the advice of his own attorney made in open court that counsel was not ready to proceed with trial. A review of the record demonstrates that defense counsel was faced with an extremely strong State's case. The evidence of defendant's guilt was overwhelming. At trial, defense counsel cross-examined each of the State's witnesses, made timely objections, presented a defense consisting of the defendant's testimony, and made an extensive closing argument. Under the circumstances of this case, we conclude that the record does not demonstrate that defendant's trial counsel was

incompetent or that the defendant was in any way denied a fair trial.

The next possible argument which could be raised on appeal is that defendant's sentence is excessive and should be reduced. While this court has the power to reduce sentences (Ill. Rev. Stat. 1971, ch. 110A, par. 615(b).), that power should be exercised with care and only where it is manifest in the record that the sentence is excessive. (People v. Fox, 48 Ill. 2d 239, 269 N.E.2d 720; People v. Conway, 3 Ill. App. 3d 69, 278 N.E.2d 852.) The trial judge who heard the testimony and matters presented in aggravation and mitigation is ordinarily in a better position than a reviewing court to determine the punishment to be imposed. People v. Winfield, 133 Ill. App. 2d 48, 272 N.E.2d 848.

In the case at bar, the pre-sentence investigation hearing and the hearing in aggravation and mitigation revealed that defendant had an extensive criminal background including three prior felony convictions each of which resulted in a penitentiary sentence. The sentence imposed upon the defendant was within the statutory limits for the crime of attempt robbery. A review of the facts adduced at trial and defendant's prior record demonstrates that the sentence imposed by the trial judge was proper.

We have examined the record and concur in the opinion of defense counsel that none of the arguments raised has substantial merit. Our inspection of the record does not disclose any additional possible grounds for an appeal which are also not frivolous.

The appointed counsel is granted leave to withdraw as counsel on appeal and the judgment of the circuit court of Cook County is affirmed.

Affirmed.

[PUBLISH ABSTRACT ONLY.]

3D
27 I.A. 162

60078



PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
) Appeal from the Circuit
v.)
) Court of Cook County.
)
HENRY BYRD,)
) Arthur L. Dunne, J.
Defendant-Appellant.)

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

On March 2, 1973, around 10:20 A.M., the 137th Street station of the Illinois Central Railroad in Riverdale, Illinois, was robbed by two men. While one robber held a gun upon Loretta Lucas, the ticket agent, and a passenger, the second robber took a cloth bag containing rolls of coins and a leather satchel containing currency and miscellaneous items such as a wrench, an Illinois Central train schedule and two Illinois Central envelopes from Mrs. Lucas.

While the robbery was in progress, Peter Angelos, an electronic technician employed by the railroad, approached the station in an Illinois Central truck. He drove under the railroad viaduct at 137th street and parked his truck. As he did so he noticed an automobile, with one man in the driver's seat, parked in a no parking zone facing west on 138th Street. His suspicion was aroused and he wrote down the license number and the description of the auto. As he entered the station he saw two men walking west on 138th street. Mrs. Lucas met him at the doorway and informed him of the robbery. He immediately returned to his truck and communicated the news and a description of the auto, which at that time was being driven west on 138th Street, to Illinois Central authorities.

Officers in four police vehicles responded to messages of the robbery. Sergeant Sommer came upon the auto on 138th Street. It was going west and was occupied by three men. Sommer turned his eastbound unmarked vehicle around, transmitted his information by radio to other police cars in the area, and gave chase. Officer Miller heard the description, drove his car into 138th Street, saw the suspect auto and pursued it. The auto stopped for a red light at 138th and Halsted and then turned north. Miller turned on his overhead light and followed. The pursued auto slowed but did not stop, and Sommer swung his car in front of it. Officer Miller closed in from behind and the auto was stopped at the top of a railroad overpass, one and one-half blocks north of 138th Street. They were joined later by Officer Lewis in a third police car and by Officer Ford in a fourth. Ford and his partner were close to the Illinois Central station when they first learned of the robbery; they sped to the station and received from Peter Angelos a full description of the men he had seen and the car he had observed.

Sommer and Miller, with their guns drawn, ordered the three men out of the auto. Gregory Levi emerged from the right front seat and the defendant, Henry Byrd, from the driver's seat. Millard Levi got out of the back and as he did so he threw a satchel and a white bag over the guardrail of the overpass. The bag which contained rolls of coins and the open satchel, and some articles which apparently fell from it, including loose currency, a wrench and an Illinois Central train schedule, were recovered at the bottom of the embankment. An automatic revolver was found in the satchel and a loaded revolver was recovered from under the front seat of the auto. An Illinois Central envelope was found on the rear seat and another was found on the rear floor.

The three suspects were indicted for the robbery. Gregory and Millard Levi pleaded guilty. Henry Byrd pleaded not guilty and waived a jury trial. He was found guilty of armed robbery and was sentenced to the penitentiary for a term of 4 to 12 years.

Byrd was not accused of being one of the two men who held up the station agent. He was tried and convicted on the theory that, as the driver of the auto used in the robbery, he was accountable for their crime. He contends that the evidence did not establish his complicity in the robbery and therefore his guilt was not proved beyond a reasonable doubt. He points out that: he was not identified as the man who was seen sitting in the auto parked near the Illinois Central station; there was no evidence that he knew his companions had committed an armed robbery; the two men seen leaving the station were walking not running so there was nothing in their behavior to make him suspect criminal activity; the police admitted that at no time did he attempt to elude them; he did not drive in excess of the speed limit; he stopped at traffic signals; he did not attempt to get away when he became aware that a police car was following him, but slowed down and stopped; no proceeds of the robbery were found on him or near him and the gun and the envelopes found in the auto were not in his vicinity.

A person is legally accountable for the conduct of another when, either before or during the commission of the offense and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense. Ill.Rev.Stat., 1971, ch. 38, para. 5-2(c). If Byrd first became aware of the robbery after it had been committed and then aided the robbers to escape,

he would be an accessory after the fact but would not be accountable for the robbery itself. But if he knew that a robbery was planned and aided or agreed to aid in its commission, he would be just as guilty as if he had robbed the victim himself.

The case against Byrd rested on circumstantial evidence; however, circumstantial evidence is legal evidence and the State presented substantial evidence from which the trier of facts could reasonably infer that Byrd was an active participant in the robbery. He was the driver of the get-away auto; he did not drive his companions to the railroad station at ten in the morning so they could board a train; he waited close to the station in a prohibited parking zone for them to come out; he was headed west, the direction that conformed to their exit; he couldn't avoid seeing the satchel and money bag — articles his friends did not have when they went into the station, nor could he avoid seeing one of them shove a revolver under the seat next to him; he wasted no time in taking off; while he did not drive at an excessive speed, he had reason to believe that his auto had been detected and he stopped at Halsted Street because a red light forced him to; he reduced his speed when he saw a police car flashing its lights but he did not stop until he was trapped by the cars driven by Sommer and Miller; he got out of the auto only after he was ordered to do so by armed officers of the law; although he saw one of his associates trying to dispose of the incriminating evidence, he never expressed surprise nor professed his innocence.

No reasonable conclusion could be drawn from this evidence other than that the defendant Byrd knew that the Illinois Central station was to be held up and that he was a willing participant in the robbery. His guilt was proven beyond a reasonable doubt and the judgment is affirmed.

Affirmed.

3D
27 I.A. 163

Nos. 60376
60377



PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellant,)	
	)	COURT OF COOK COUNTY.
v.)	
	)	HONORABLE
ALFONSO SPEIGHTS and WILFORD BOSS,	)	THOMAS ROSENBERG,
	)	PRESIDING.
Defendants-Appellees.)	

Before DEMPSEY, McNAMARA and MEJDA, JJ.

PER CURIAM:

The State, pursuant to Supreme Court Rule 604(a)(1) (Ill.Rev. Stat. 1973, ch.110A, par.604(a)(1)), appeals from an order of the circuit court of Cook County quashing defendants' arrest. Although defendants have not filed briefs in this court, we choose to deal with the merits of the case.

At the hearing on the motion to quash defendants' arrest, Chicago Police Officer J. Collier testified that on January 25, 1973, at 4500 West Fifth Avenue, Chicago, Illinois, he and his partner were on patrol when they were stopped by the defendants. Defendant Boss informed the officers that he wanted to recover his automobile which had been stolen and found at that location. Officer Collier stated that he did not have a warrant to arrest the defendants and he did not view the defendants in the commission of any crime. Officer Collier testified that in making out his report he asked Speights how he found the automobile. Speights stated that he was riding a Fifth Avenue bus from Cicero to Kostner when he spotted the car. Officer Collier testified that he knew that there was no bus running on Fifth Avenue.

Officer Collier called the sergeant who arrived at the scene shortly thereafter. In investigating the automobile Officer Collier found what he described as one bullet hole in the left rear portion. Officer Collier, when asked if it was a hole or a dent, replied that it was a dent. The sergeant returned to the station to check out the vehicle. The sergeant found that an automobile described as a 1967 or 1968 two-door Cadillac, beige or black and beige with three bullet holes in the rear portion had been used in a burglary. The

10. 11. 1912

vehicle which the officers were investigating was a black and yellow two-door 1967 Cadillac. Officer Collier also testified that he had been told to be on the lookout for any automobiles with bullet holes since one had been used in the killing of a police officer. Officer Collier did not have any description of the vehicle or men involved in that incident. After the sergeant radioed his findings, Officer Collier placed the defendants under arrest and transported them to the station.

The State's only argument on appeal is that the police had probable cause to place the defendants under arrest. The rule is well established that a police officer may arrest a person without a warrant when he has reasonable grounds to believe that the person is committing or has committed an offense (Ill.Rev.Stat. 1973, ch. 38, par.107-2(c)). Probable cause exists when a reasonable and prudent man in possession of the knowledge which has come to the arresting officer's attention would believe the person to be arrested is guilty of the crime. (People v. Harper (1973), 16 Ill. App.3d 252, 305 N.E.2d 680.) On a motion to quash defendants arrest, the burden of proof rests upon the defendant. However, once a defendant has made out a prima facie case that the police lacked probable cause, the burden of going forward shifts to the State to negate the evidence adduced at the hearing. People v. Riszowski (1974), 22 Ill.App.3d 741, 318 N.E.2d 10; People v. Williams (1973), 16 Ill.App.3d 440, 306 N.E.2d 678; People v. King (1973), 12 Ill.App.3d 355, 298 N.E.2d 715.

In the case at bar, the defendants have satisfied their legal burden. Officer Collier admitted that he did not have an arrest warrant for the defendants and that he did not observe them commit any crime. Defendants stopped Officer Collier and his partner while they were on patrol. Defendant Boss informed Officer Collier that he wished to recover his car which had been stolen and found at that location. Officer Collier was aware that defendant Speights had lied in telling him the manner in which he had found the automobile. While this is one element which might tend to establish

probable cause, it is insufficient in itself to establish probable cause. The only other evidence in Officer Collier's possession which could in any way establish probable cause for defendants' arrest was the fact that after checking at the station the sergeant found that a car of a similar description had been used in a burglary. The description of the car used in the burglary was a 1967 or 1968 two-door Cadillac, beige or beige and black with damage to the rear panel by three bullet holes. The vehicle in the defendants' possession was a 1967 yellow and black two-door Cadillac with what Officer Collier described as one bullet hole in the left rear panel. Officer Collier also testified that it was not a hole but a dent. The State on appeal admits that the damage to the rear of the car could have been caused by some totally innocuous agent. Even if we were to conclude that this evidence was sufficient to establish probable cause that defendants' vehicle was used in the burglary, there is a complete lack of evidence that the defendants themselves were in any way connected with the burglary. Officer Collier did not testify that either of the defendants met any description the police might have had of the man or men involved in the burglary. Also there is nothing in the record as to the date defendants' car was allegedly stolen or the date of the alleged burglary. On the basis of the record before us, the proof adduced at the hearing on the motion did not demonstrate that the police had probable cause for defendants' arrest. The trial court properly quashed the arrest as being illegal.

Accordingly, the order of the circuit court of Cook County quashing defendants' arrest is affirmed.

Order affirmed.

27 I.A. 164



Nos. 60663
60664

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellant,)	
	)	COURT OF COOK COUNTY.
v.)	
	)	HONORABLE
JAN CARROLL,	)	ARTHUR V. ZELEZINSKI,
	)	PRESIDING.
Defendant-Appellee.)	

Before DEMPSEY, McNAMARA and MEJDA, JJ.

PER CURIAM:

Jan Carroll, defendant, was charged with the unlawful possession of marijuana in violation of Section 4 of the Cannabis Control Act and also with the unlawful possession of a controlled substance, cocaine, in violation of Section 402 of the Controlled Substances Act (Ill.Rev.Stat. 1973, ch.56 1/2, pars.704, 1402). The trial court sustained defendant's motion to suppress the physical evidence. The People appeal pursuant to Supreme Court Rule 604(a)(1). While no brief has been filed by defendant in this court, we will consider the matter on its merits.

The sole issue on appeal is whether the trial court erred in sustaining defendant's motion to suppress the physical evidence.

At the hearing on defendant's motion to suppress, Chicago Police Officer Richard J. Braithwaite testified that on May 1, 1973, an informant told him that he would call the next day at about 6:30 p.m. and give Braithwaite some information. Braithwaite said he had known the informant for six years, during which time informant had given him information relating to narcotics on about 25 occasions; and that contraband was recovered in at least 20 of these cases, which led to 11 convictions.

On May 2, 1973, informant called at about 7:15 p.m. and asked Braithwaite to meet him at 2853 North Clybourn Avenue, Chicago. Braithwaite and his partner went to that address and spoke to informant for about five minutes. Informant told the police officers that a white female named "Jan," wearing green slacks, was in a tavern at 2857 Clybourn; that she had hidden a tin-foil packet of marijuana under the floor mat on the driver's side of her automobile.

The informant pointed out the automobile to the officers. It was parked in the rear of the tavern. Informant said that defendant had offered to sell him drugs; that he asked to see the drugs and she reached in her slacks, pulled it out, showed him two white packets, and put them back in her slacks; and that he told defendant he had to go home and get some money, at which time he contacted Braithwaite. Braithwaite said he and his partner waited for about 35 minutes in an unmarked squad car behind a garage about 25 feet from the defendant's automobile. At the end of that time, defendant came to her car and opened the driver's door. Braithwaite said he walked up to defendant's car, announced his office and told her that he knew that she was in possession of marijuana. Defendant said the car belonged to her. By this time she had opened the door and Braithwaite said he reached under the floor mat, recovered a tin-foil packet, which he found to be marijuana, and then placed defendant under arrest. Defendant was taken to the police station where she was searched by a policewoman who found two packets of cocaine on defendant's person.

On cross-examination, Braithwaite said that when he came up to the car defendant was not free to leave; and that when he announced his office she was then under arrest. On questioning by the court, Braithwaite said he found the substance first and then placed defendant under arrest.

Defendant testified that her car was parked in the alley in back of the tavern; and that there was someone sitting in another car parked in the back. She said that the police officer did not have a warrant for her arrest nor a search warrant for her person or her car; that the police officers searched the automobile without her permission and found the substances which were the subject matter of the motion to suppress. Defendant further testified that a girl named Margaret was walking with her when she walked out of the tavern. Defendant said she did not tell anyone in the tavern that she would sell narcotics or that there was a packet of marijuana in her automobile.

The record indicates that the trial court based its decision on its conclusion that defendant had not been arrested at the time of the search. In sustaining the motion to suppress, the trial court stated:

"If you had a reliable informant, Officer, you should have placed her under arrest, if the informant is that reliable."

By this statement it is clear that the trial court was of the opinion that defendant must be under arrest before there can be a legal search. However, there is no requirement that evidence be suppressed just because a formal arrest followed rather than preceded the search, so long as there is probable cause for the search and so long as the arrest is substantially contemporaneous with the search. It is the reasonableness of the search without a warrant that is of primary importance and not whether the search occurred before or after defendant was arrested and taken into custody. People v. Pickett (1968), 39 Ill.2d 88, 233 N.E.2d 560; People v. Cole (1973), 54 Ill.2d 401, 298 N.E.2d 705.

In People v. Herbert (1971), 131 Ill.App.2d 518, 268 N.E.2d 205, the court allowed evidence obtained in a warrantless search where the police searched the trunk of an automobile after receiving word from a reliable informant that the defendant would deliver a large quantity of narcotics in a 1963 gold covered Cadillac. Citing People v. Tassone (1968), 41 Ill.2d 7, 241 N.E.2d 419, the court stated at pp.521-522:

We need not decide whether the search and seizure can be sustained under the traditional test of whether it was incident to an arrest without a warrant based on probable cause to believe that the defendant had committed or was committing a felony. The validity of all searches and seizures must be determined from the facts and circumstances in each case in the light of the fourth amendment's proscription of unreasonable searches and seizures and consistent with the opinions of the United States Supreme Court. (Ker v. California, 374 U.S. 23, 10 L.Ed.2d 726, 83 S.Ct. 1623.) In Terry v. Ohio, 392 U.S. 1, the court held that a limited search could be reasonable without being incident to a valid arrest based on probable cause. Whether a search and seizure is reasonable depends upon whether the officer's action was justified at its inception and whether it was reasonably related in scope to the circumstances which justified initial interference with a defendant's personal security. In making this determination an objective

standard is to be applied: would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution to believe that the action taken was appropriate? (Citation omitted.)

In the case at bar, the police officers had probable cause to arrest defendant. Police Officer Braithwaite testified he had known the informant for six years, during which time informant had given him information relating to narcotics on about 25 occasions, and that contraband was recovered in at least 20 of these cases, which led to 11 convictions. The informant told Braithwaite and his partner that a white female named "Jan," wearing green slacks, was in the tavern at 2857 Clybourn, Chicago; that she had a hidden tin-foil packet of marijuana under the floor mat of the driver's side of the car, which informant pointed out to the police officers, and which was parked in the rear of the tavern at 2857 Clybourn, Chicago. Informant also told the police officers that defendant had offered to sell him two packets of drugs; that he asked to see the drugs and she reached in her slacks, pulled it out, showed him two white packets, and then put them back in her slacks; and that he told defendant he had to go home and get some money, at which time he contacted Braithwaite. Braithwaite said that he and his partner waited for about 35 minutes in an unmarked squad car behind a garage about 25 feet from defendant's automobile. At the end of that time, defendant came to her car and opened the door on the driver's side of the car. Braithwaite said he walked up to defendant's car, announced his office and told defendant he knew she was in possession of marijuana. Defendant said the car belonged to her. Braithwaite said he reached under the floor mat, recovered a tin-foil packet, which he found to be marijuana, and that he then placed defendant under arrest. Defendant was taken to the police station, where she was searched by a policewoman, who found two packets of cocaine on defendant's person.

It is well established that an arrest by a police officer without a warrant is proper if the officer has reasonable grounds to believe that an offense has been committed and that the person

to be arrested committed it; and that such reasonable grounds may be information supplied by an informer of established reliability. People v. Gant (1973), 14 Ill.App.3d 282, 302 N.E.2d 376; People v. Hampton (1973), 14 Ill.App.3d 427, 302 N.E.2d 691; People v. Singleton (1973), 16 Ill.App.3d 436, 306 N.E.2d 683; People v. Nickson (1974), 22 Ill.App.3d 836, 318 N.E.2d 73.

Under these facts, the trial court erred in sustaining defendant's motion to suppress the evidence.

The judgment of the circuit court of Cook County is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed;
cause remanded.

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27 I.A. 166



No. 60788

ESTATE OF JOSEPH PARRILLI, ALSO)
KNOWN AS JOSEPH V. PARRILLI,)
Deceased, ROBERT W. SCHERMAN,)
Executor,)

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.

Petitioner-Appellant,)

v.)

HONORABLE
ANTHONY J. KOGUT,
PRESIDING.

GEORGE J. PARRILLI,)

Respondent-Appellee.)

MR. JUSTICE McNAMARA delivered the opinion of the court:

This is an appeal by an estate executor, Robert W. Scherman, from an order of the probate division of the circuit court of Cook County denying him executor's fees. The executor presented to the court his first current account for approval, in which he retained the sum of \$2,000 on account for executor's fees. The current account also revealed a payment of \$2,000 to Milton K. Joseph for attorney's fees. George J. Parrilli, one of the heirs, filed an objection to the current account. The sole basis for the objection was that the executor was a "licensed and currently practicing attorney," and that he "should represent himself and not retain outside counsel at fees to be paid by the estate." No objection was made to the amount of the fees requested. The total estate amounted to approximately \$120,000, \$92,500 in real estate and \$27,000 in personalty.

At the hearing on the petition for fees, the executor testified by way of evidence deposition that he had retired from the practice of law in 1961. The executor had represented the decedent since 1940, and had given advice to the decedent after his retirement. The executor drafted the decedent's last will at the latter's request. The decedent also instructed him to name himself as executor. The decedent died in October 1972, and the executor was appointed November 20, 1972. The executor further testified that decedent and every member of his family knew that the executor had retired from the active practice of law in 1961.

The executor also testified that after decedent's funeral he notified all of the heirs that he was not practicing law and that he would retain counsel. The heirs made no objection. In 1974, the executor moved to San Diego, California.

At the hearing, the trial court considered the executor's petition for fees, the objection of the heir, and the uncontroverted testimony of the executor. The trial court awarded attorney's fees in the amount of \$2,000 to Mr. Joseph, but denied any fees to the executor.

The appellee has failed to file an appearance or answering brief in this court. Ordinarily, in such instances, this court, despite appellee's failure to file a brief, will examine the record to determine the merits of the appeal. (Daley v. Richardson (1968), 103 Ill.App.2d 383, 243 N.E.2d 685.) However, in certain cases, this court, because of appellee's failure to submit a brief, has reversed pro forma without setting forth any additional reasons. (Matyskiel v. Bernat (1967), 85 Ill.App.2d 175, 228 N.E.2d 746; Gibraltar Corp. v. Flobudd Antiques, Inc. (1971), 131 Ill.App.2d 545, 269 N.E.2d 515.) In our view, the present case is appropriate for the latter action of a pro forma reversal of the order entered.

Accordingly, the order of the circuit court of Cook County denying fees to the executor is reversed, and this cause is remanded with directions to allow the executor the fee requested.

Judgment reversed and cause
remanded with directions.

DEMPSEY and MEJDA, JJ., concur.

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60416 - 60420 Consolidated



IN THE MATTER OF A SEARCH WARRANT)
)
 PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellant,)
)
 vs.)
)
 BOBBIE SMYLES,)
)
 Defendant-Appellee.)
)
 CITY OF CHICAGO, a municipal)
 corporation,)
 Plaintiff-Appellant,)
)
 vs.)
)
 BOBBIE SMYLES,)
)
 Defendant-Appellee.)

APPEAL FROM
 CIRCUIT COURT
 COOK COUNTY.

HONORABLE
 JAMES E. MURPHY,
 PRESIDING.

Before Stamos, Leighton and Hayes, JJ.

Per Curiam

The defendant, Bobbie Syles, was charged by complaint with four separate offenses growing out of the execution of a search warrant on January 7, 1973: a charge of possession of marijuana (Ill. Rev. Stat. 1973, ch. 56 1/2, par. 704); a charge of failure to have an Illinois Firearm Owner's Identification Card for a .22 caliber revolver she possessed (Ill. Rev. Stat. 1973, ch. 38, par. 83-2(a)); and charges of possessing the same .22 caliber revolver but failing to register it with the City Collector's Office of the City of Chicago as required by ch. 11, section 1.7 of the Municipal Code of the City of Chicago, and failure to carry a registration certificate for it as required by section 1.8 of the Municipal Code of the City of Chicago. The search warrant was issued by Judge Ben Edelstein and signed by him on January 7, 1973, at 11:35 a.m. for the defendant and Apartment 414, 5518 Dorchester, Chicago, Illinois. Prior to trial, the court granted defendant's motion to quash the search warrant and suppress the evidence on the ground that there had been a material alteration in the affidavit portion of the Complaint for Search Warrant. Two dates were changed by drawing a line through the typewritten

dates and writing the corrected date above the date lined out. As changed, the affidavit, stated the police officer's information was obtained on January 5, 1973, from an informant who made a purchase of marijuana from the defendant on December 30, 1972; as typed, it stated the information was obtained on January 5, 1972, from an informant who made a purchase from defendant on January 30, 1972. The portion for the Complaint for Search Warrant at issue was as follows:

Complainant says that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the (person and) premises set forth above:

INFORMATION: I, Officer Dan Davis, A Chicago Police Officer assigned to the Tactical Unit of the 021st. District of the Chicago Police, had a conversation with a reliable informant on 5 Jan. 1972, 1800 hrs. The informant stated that on 30 ^{Dec} Jan 1972 he went to apt 414 located at 5118 Dorchester and purchased two five dollar bags of Marijuana from a F/N known to him only as Bobbie. The informant further stated that he observed quantities of marijuana and Dangerous Drugs in the apt while he was there. The informant knew these articles to be narcotics due to himself being an addict for some eight years.

The state's attorney moved orally to call Officer Davis to testify that the two changes in the above quoted material were made by him prior to his presenting the affidavit to the issuing judicial officer. The defendant objected, the objection was sustained, and the motion to quash was granted. The state's attorney then made an offer of proof that, if called, Officer Davis would testify that the changes were made by him before the judge signed the warrant and that the warrant was then the same as when he presented it to the judge issuing the warrant. The State appeals from the order quashing the warrant and suppressing the evidence, pursuant to Supreme Court Rule 604(a)(1). Ill. Rev. Stat. 1973, ch. 110A, par. 604(a)(1).

Defendant has filed no brief in this court. Therefore this court may either reverse pro forma or consider the appeal on its merits. (Daley v. Jack's Tivoli Liquor Lounge (1969), 118 Ill. App. 2d 264, 254 N. E. 2d 814.) We follow what is ordinarily the better practice and consider the appeal on its merits. People v. O'Shea (1975), ___ Ill. App. 3d ___, ___ N. E. 2d ___, Gen. Nos. 59958-59.

The State contends that the two alterations in the complaint for search warrant should be "presumed to have been made prior" to presentation to the

issuing judge. Alternatively, the State contends it should have been allowed to prove that the alterations were made prior to presentation to the issuing judge. In People v. Gonzalez (1974), 24 Ill. App. 3d 259, 263, ___ N. E. 2d ___, the defendant claimed a warrant was invalid because it was applied for, issued, and executed on July 18, but the facts relied upon to show probable cause included an arrest of the defendant on "June 18". The reviewing court found it was obvious that there had been a clerical error and held that this could be shown on the motion to suppress. In upholding the warrant the court stated:

"Defendant contends that the facts related in an affidavit supporting a search warrant cannot be controverted, citing People v. Bak (1970), 45 Ill. 2d 140, and People v. Mitchell (1970), 45 Ill. 2d 148. The holding that there is no right to controvert matters declared under oath which occasion the finding of probable cause and the issuance of a search warrant by a judicial officer does not, in our view, preclude a showing of what is clearly a clerical error. The weight of authority supports this view. (See Annot., 100 A.L.R. 2d 525, 543; Lyons v. State (Tex. Crim. App. 1973), 503 S. W. 2d 254, 255-256; State v. Cain (Fla. App. 1972), 272 So. 2d 548, 549; Flinn v. State (1953), 97 Okla. Crim. 28, 257 P. 2d 324, 325; Hendricks v. State (1926), 144 Miss. 87, 109 So. 263, 264; Pera v. United States (9th Cir. 1926), 11 F. 2d 772, 773; Baker v. Commonwealth (1924), 204 Ky. 536, 264 S. W. 1091, 1092.)"

Recently, in People v. Herbert Mays, ___ Ill. App. 3d ___, ___ N. E. 2d ___, (December 31, 1974, General Number 60196), we said that rather than stretching the imagination to construe an affidavit for search warrant as faulty, "ambiguities should be resolved in a way that takes into account that a judicial officer has reviewed the matter."

Applying Gonzalez and Mays to the problem in this case, we think it is unlikely that a judge would issue a warrant on the basis of information a year old. The presumption, if any, should be that the corrections and changes were made at or prior to the time the affidavit was presented to the issuing judicial officer. At most, the original error was a clerical one and, based on the presumption, the State should have been allowed to show by calling Officer Davis that what was "clearly a clerical error" had been corrected. Therefore, we think the court could properly have assumed that the changes were made at or prior to the time the complaint for search warrant was presented. Alternatively, the State should have been allowed to prove, by Officer Davis' testimony, that the changes were

in fact made at or prior to the time that the complaint was presented to the issuing judicial officer. The judgment of the circuit court of Cook County is therefore reversed and the cause is remanded for further proceedings.

Reversed and remanded.

Abstract only.

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73-246 & 73-248
UNITED STATES OF AMERICA

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271 185

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

SECOND DIVISION

Present: -- Honorable L. L. RECHENMACHER, Presiding Justice
 Honorable WALTER DIXON, Justice
 Honorable THOMAS J. MORAN, Justice
 LOREN J. STROTZ, Clerk
 WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On April 11, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

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No. 73-246
248) Cons.

Abstract

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

FILED

APR 11 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court
v.	)	for the 17th
	)	Judicial Circuit,
DAVID BARTON BASSETT and	)	Winnebago County,
DENNIS EARL BEEBE,	)	Illinois.
)	
Defendants-Appellants.)	

JUSTICE THOMAS J. MORAN delivered the opinion of the court:

After waiving indictment, defendants pled guilty to an information charging them with the offense of theft; each was sentenced to a term of 2 to 6 years imprisonment.

In their consolidated appeal, the defendants contend that the trial court erred in failing to comply with Supreme Court Rule 401(b)(1) and (3) prior to accepting their waiver of indictment, and in failing to comply with Supreme Court Rule 402(a)(1), (b) and (c) prior to accepting their pleas of guilty.

At arraignment on the original complaint charging defendants with theft, the court informed them of the nature of the charge, appointed counsel on their behalf and continued the matter for hearing. One month later, defendants moved the court to waive the necessity of indictment. Prior to allowing the motion, the court (1) explained the function of the grand jury, (2) explained the

procedure that would follow if the motion was allowed (i.e., the State would file an information on the charge), (3) read the charge contained in the information proposed to be filed, and (4) related the minimum and maximum sentences that could be entered against the defendants. Being informed by the defendants, individually, that they understood the effects of their waiver, the court allowed their motion.

Immediately thereafter, defense counsel informed the court that the defendants desired to plead guilty to the charge contained in the information, with the understanding that the State would dismiss another unrelated charge. Defendants were admonished as required under Rule 402(a), (Ill. Rev. Stat. 1971, ch. 110A, §402(a)) except that the court did not again read the charge as contained in the information. Following the admonishment, the State revealed the facts in support of the charge.

The State's synopsis revealed that on the morning of December 1972, the defendant Bassett took the keys to his mother's car without her permission, that he met defendant Beebe, and that they together stole the car from a parking lot. The two spray-painted the top of the car, painted a stripe down the hood, and changed the license plates. They were apprehended that same evening by the police and gave statements to the officers. Upon inquiry, both defendants stated that the facts related by the State's Attorney were correct. While both admitted taking the car, Beebe stated that at first they had not intended to keep the car permanently, but later changed their minds and determined to do so. Thereupon, the trial court accepted the defendants' pleas of guilty.

Defendants had earlier entered a plea of guilty to burglary and were awaiting a psychiatrist's report in that case. It was agreed that the psychiatrist's findings would be made a part of the

record in the instant case. For a resume of the findings, see People v. Bassett, ___ Ill. App. 3d ___, 323 N.E. 2d 607, 610-12 (1975).

Defendants contend that by reading the charge contained in the information without explaining the necessary elements constituting the charge, the court failed to comply with Rule 401(b)(1). They further allege that the court erred by failing to refer to the process of a grand jury indictment as a right. (Rule 401(b)(3).) It should initially be noted that a valid complaint, information or indictment must contain all of the necessary elements of the charge. Defendants' do not question the validity of the information. In People v. Bassett, supra, at pages 608-10, this court considered the identical issues in conjunction with a virtually identical admonition, and there held that the reading of the information was sufficient to apprise a defendant, represented by counsel, of the nature of the charge. There, too, it was stated that the grand jury process need not be referred to specifically as a right where the record as a whole shows, as it does in the instant case, that the defendants' waiver was intelligently, understandingly and voluntarily made. We adopt the reasons set forth in that case in answer to these contentions and hold that the trial court satisfied the requirements of Supreme Court Rule 401(b)(1) and (3).

The defendants next contend that the trial court failed to inform them of the nature of the charge prior to accepting their pleas of guilty. As noted in People v. Bassett, supra, the defendants, once advised in the same hearing, need not be again advised for compliance with Supreme Court Rule 402(a)(1). Too, the record,

when taken in its entirety, shows that the State's Attorney stated what the People expected to prove, that the defendants found this synopsis to be correct, and that they further elaborated on their guilt. Upon these facts, we conclude that the trial court complied with Supreme Court Rule 402(1)(a) and that the defendants understood the nature of the charge. See People v. Hardaman, 59 Ill. 2d 155, 157 (1974) and People v. Krantz, 58 Ill. 2d 187, 192-93 (1974).

Defendants also claim that there was no factual basis for the pleas of guilty as required by Supreme Court Rule 402(c), and base this assertion on the statement by Beebe that they did not intend to deprive the owner permanently of her property. If Beebe's statement that the two did not intend to keep the car permanently was to be credited as a sincere assertion of their innocence, then a factual and legal dispute would exist and, without more, his statement would negate the necessary state of mind for the crime charged. However, the court also had before it the factual background related by the State and concurred in by the defendants. Those facts revealed that the defendants set out on a course of conduct from which it can be inferred that they intended at the time of the act to permanently deprive the owner of her property. The vehicle was taken without permission, altered in its appearance, its license plates replaced, and its return was accomplished only by their apprehension. In light of this background, defendants' contention is without merit and we therefore find sufficient factual background upon which the trial court could accept the pleas of guilty. See North Carolina v. Alford, 400 U.S. 25, 27 L. Ed. 2d 131, 91 S. Ct. 160 (1970).

Defendants allege that the trial court failed to determine that the pleas of guilty were voluntary as required by Supreme Court Rule 402(b), and that because of the defendants' history of mental disorders, this error requires reversal. The record reveals

that the court did not expressly inquire as to whether or not any force, threats or promises were used to induce defendants' pleas of guilty.

"While we do not approve of any failure to comply strictly with the explicitly stated requirements of Rule 402, it does not follow that every deviation therefrom requires a reversal. If upon review of the entire record it can be determined that the plea of guilty***was voluntary, and was not made as the result of force, threats or promises***the error resulting from failure to comply strictly with Rule 402(b) is harmless." People v. Krantz, 58 Ill. 2d 187." People v. Ellis, 59 Ill. 2d 255, 257 (1974).

There is no claim made by the defendants that their pleas of guilty were involuntary or the result of force, threats or unfulfilled promises. Nor is there a claim of harm or prejudice by the trial court's failure to inquire as to the voluntariness of their pleas. Under such circumstances we will not reverse the conviction. People v. Jones, Gen. No. 74-110, 2d Dist., ___ Ill. App. 3d ___ (1975); People v. Franklin, 15 Ill. App. 3d 431 (1973). Also see, People v. Murrell, Gen. Nos. 46849 & 46850, ___ Ill. 2d ___ (1975).

The record here affirmatively shows that the defendants were pleading guilty because they were in fact guilty and that they were admonished of their constitutional rights and the effect a plea of guilty would have upon these rights.

"It is not the policy of this court to reverse a judgment of conviction merely because error was committed unless it appears that real justice has been denied***." People v. Dudley, 58 Ill. 2d 57, 61 (1974).

A review of the entire record leads to the conclusion that the pleas of guilty were voluntary, and that real justice was done. We therefore find the trial court's failure to comply with Supreme Court Rule 402(b) harmless. The mental disorders of the defendants do not raise a bona fide doubt of the defendants' competency to plead guilty.

People v. Bassett, supra.

Judgment affirmed

RECHENMACHER, P.J., DIXON, J., concur



27 I.A. 284^{3D}

NO. 74-175

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

FILED
MAR 27 1975

Walter T. Simmons
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

DONNA KAY OLIVER,

Plaintiff-Appellee,

v.

RICHARD EUGENE OLIVER,

Defendant-Appellant.

} Appeal from the Circuit Court
of Jefferson County

} Honorable Roland De Marco,
Judge Presiding.

Mr. JUSTICE KARNS delivered the opinion of the court:

This is an appeal from an order of the Circuit Court of Jefferson County finding defendant, Richard Eugene Oliver, in contempt of court for failure to comply with a certain provision of a divorce decree.

Donna Kay Oliver obtained a default divorce on June 14, 1973, on the grounds of mental cruelty. At her request, the decree made no award of alimony or child support. The part of the decree in question, drafted by plaintiff-appellee's attorney, states:

That the 1973 Cougar automobile and the 1972 Honda motorcycle, both subject to debts thereon, and for which debts plaintiff is jointly liable with the defendant, defendant is entitled to said vehicles as his sole and separate property, provided that he pays the debts thereon, and saves plaintiff harmless therefrom; and that in the event plaintiff is called upon to pay said debts, and she does pay said obligations, then she should be the sole and separate owner of said property and be liable to the defendant for any equity therein, if any; and the Court finds further with respect to said vehicles that the defendant is entitled to them provided he pays the debts thereon and saves plaintiff harmless therefrom, and otherwise, as hereinbefore found equitable by the Court.

Plaintiff filed a petition for a rule to show cause based on defendant's failure to make payments on the automobile and motorcycle. The evidence at the hearing showed that subsequent to the divorce decree, defendant made no payments on the property involved; that the creditors had demanded payment of plaintiff who was employed and who was jointly liable on the debts with defendant, unemployed,

under the purchase agreements, and had threatened to invoke a wage assignment; and that subsequently plaintiff had made payments in the net amount of \$563.80. The motorcycle has disappeared, the only evidence of the circumstances being defendant's statement that it had been stolen. The automobile was repossessed from the defendant and, though its whereabouts was in conflict, plaintiff eventually learned its location. Though the record indicates that communication occurred between plaintiff and her attorneys and defendant about the payments, there is no evidence that plaintiff ever demanded possession of the automobile and motorcycle as was her right under the decree.

Defendant is receiving \$77 per week unemployment compensation, is paying \$25 per week on another car, and is remarried to a woman with a minor child. The defendant was found in contempt of court and ordered to pay \$50 per week to reimburse plaintiff for the payments made on the automobile and motorcycle and was ordered to pay court costs and \$150 attorney's fees, incurred by plaintiff in the prosecution of the contempt action, over a three-month period. Plaintiff returned to court when defendant failed to make the ordered payments and a contempt mittimus was issued. Defendant was not represented to this point. Counsel appeared and on motion of defendant the mittimus was quashed. Defendant's post-trial motion was denied.

Plaintiff-appellee argues that the divorce decree is ambiguous and that this Court should consider the circumstances existing at the time the decree was entered to construe properly its meaning and intent. Waldron v. Waldron, 13 Ill.App.3d 964, 301 N.E.2d 167 (1973). While this is a correct statement of the law, it is founded on the existence of ambiguity. Where no ambiguity exists on the face of the decree, basic contract rules apply and the intent of the parties is determined by the language of the instrument. Sudler v. Sudler, 6 Ill.App.3d 546, 286 N.E.2d 113 (1972); Brandel v. Brandel, 69 Ill.App.2d 264, 216 N.E.2d 21 (1966).

We cannot agree that the decree is ambiguous. The language clearly gives defendant a choice: pay the debts and remain the owner or relinquish ownership in the event that the plaintiff is forced to pay the debts. The defendant made the choice not to pay



the debts and does not retain ownership. Plaintiff argues that besides paying the debts, defendant was obliged to "save the plaintiff harmless" therefrom. That phrase appears in the first operative clause and is separated from the second clause by a semi-colon. It modifies only defendant's first option. If defendant paid the debt, no occasion to further "save plaintiff harmless" would arise; and if plaintiff paid the debt, she became owner of the property and instead of being saved harmless, became liable to defendant for his equity.

Plaintiff also contends that defendant is liable to her for the payments made because the property was lost while in his control. We do not condone defendant's conduct in this regard and clearly a more considerate approach would have been preferred. But no such requirement appears in the divorce decree. In fact, the record is devoid of any evidence that plaintiff made any effort to gain control of the property. The provision that in the event plaintiff makes the payments she has the right to ownership binds only the parties to the decree, because, of course, creditors, not parties to the divorce, cannot be bound by its terms. Plaintiff has not received possession or ownership and is not liable to defendant for his equity under the decree.

While we do not agree with defendant-appellant that he could not possibly violate this provision, we find nothing in this record to support the finding of contempt. The order of the Circuit Court of Jefferson County finding defendant in contempt of court is therefore reversed and the contempt mittimus issued thereon is permanently quashed.

We further remand the cause to the Circuit Court with directions that it reconsider the allocation of court costs and attorney's fees, including those incurred on this appeal, in a manner pursuant to chapter 40, section 16, Ill.Rev.Stat., and consistent with this opinion.

Reversed and remanded with directions.

CONCUR: EBERSPACHER, MORAN, JJ.

PUBLISH ABSTRACT ONLY



IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILED
MAR 28 1975

Walter S. D.
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

EDWARD J. QUINLAN, JR.,

Plaintiff-Appellant,

vs.

BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF HARRISBURG, ILLINOIS, et al.,

Defendants-Appellees.

:
:
: Appeal from the Circuit Court of Saline
: County, Illinois, First Judicial Circuit.
:
:
:
: Honorable Gerald Trampe,
: Judge Presiding.
:
:
:

MR. JUSTICE EBERSPACHER delivered the opinion of the court:

This is an appeal by the plaintiff, Edward J. Quinlan, Jr., from an order entered by the circuit court of Saline County affirming the and sustaining the order of the Board of Fire and Police Commissioners of the City of Harrisburg which suspended the plaintiff from his position as Chief, and as member, of the police department of the City of Harrisburg, without pay for a period of 30 days.

On April 6, 1973, charges containing eight separate allegations of misconduct were filed against the plaintiff before the Board of Fire and Police Commissioners of Harrisburg. The relevant charges were as follows,

"ON MARCH 29th, 1973, A CHURCH LEAGUE BASKETBALL GAME WAS BEING HELD AT MALAN JUNIOR HIGH SCHOOL. AT THAT TIME, CHIEF QUINLAN MADE AN APPEARANCE AT THE GAME. HE WAS DRESSED IN UNIFORM, ACTING IN THE CAPACITY AS POLICE CHIEF. IT WAS EVIDENT THAT CHIEF QUINLAN HAD CONSUMED A QUANTITY OF ALCOHOL. (STULL)

* * *

CHIEF QUINLAN WAS OBSERVED, BY OFFICER MORRIS, DRINKING A CAN OF BEER AT THE SALINE COUNTY COURT HOUSE. THE CHIEF WAS IN UNIFORM.

ON SEPTEMBER 27th, 1972, THE RAGAIN INQUEST WAS HELD AT THE SALINE COUNTY COURT HOUSE, HARRISBURG, ILLINOIS. CHIEF QUINLAN APPEARED AT THE INQUEST AS A WITNESS. ALTHOUGH HE WAS NOT IN UNIFORM, HE WAS ACTING IN HIS OFFICIAL CAPACITY AS POLICE CHIEF. HE HAD BEEN GIVEN SUFFICIENT NOTICE THAT HE WAS TO BE A WITNESS. AT THAT TIME HE EMITTED A STRONG SMELL OF LIQUOR.

* * *

WE, THE AFOREMENTIONED, DO HEREBY CHARGE POLICE CHIEF EDWARD J. QUINLAN, JR., WITH CONDUCT UNBECOMING A POLICE OFFICER."

Notice of the charges was received by the plaintiff on May 1, 1973. On May 9, 1973, plaintiff filed a motion to dismiss, which was denied prior to the calling of witnesses at the administrative hearing commenced upon the same day. Testimony was heard on two separate evenings, May 9, 1973, and May 16, 1973. Plaintiff did not testify on his own behalf nor was he called as a witness by the Board or as an adverse witness by the complainants. After hearing the evidence, the Board entered an order finding against the plaintiff on the preceding allegations and suspended plaintiff from his duties as chief, and as a member, of the police department of the City of Harrisburg, without pay for a period of thirty days. The Board specifically found that,

"6. Respondent, as charged herein and contrary to the Rules and Regulations of the Police Department of said City of Harrisburg, Illinois, and Section 11, Sub-Paragraph 4 of the Harrisburg City Ordinance No. 649, was guilty of drinking intoxicating liquor at the Saline County Court House while on duty and in uniform.

7. Respondent, as charged herein, and contrary to the Rules and Regulations of the Police Department of said City of Harrisburg, Illinois, and Ordinance No. 649, Section 11, Sub-Paragraph 4, was guilty of coming on duty while under the influence of or partially under the influence of intoxicating liquor on March 29, 1973 and September 27, 1972, in that upon the dates aforesaid Respondent emitted the odor of alcohol while on duty.

* * *

By reason of the findings of fact and guilt herein, cause exists for the Suspension of the Respondent from his position of Chief of Police Department of the City of Harrisburg, Illinois, * * *."

No specific finding was made that the allegations of these charges constituted conduct unbecoming an officer, as charged.

The plaintiff perfected an appeal to the circuit court of Saline County. Plaintiff's complaint alleged that: (1) the charges were not filed in the manner and form as required by the rules and regulations of the Board, and were specifically lacking in compliance with Chapter 6, Section 6 and sub-paragraph (b) thereof; (2) the charges were indefinite and uncertain and, consequently, such were inadequate to enable plaintiff or prepare a defense; (3) the charges were mere conclusions rather than allegations of fact; and (4) the Board erred in denying plaintiff's motion to dismiss the charges; and prayed reversal, and that plaintiff be declared to be entitled to his pay for the period of time for which he was allegedly suspended. After denying the defendant Board's motion to dismiss plaintiff's complaint, the trial court ordered defendant Board to file an answer and, subsequently, ordered the plaintiff to submit a specification of errors. Subsequent to the compliance with its orders, the trial court entered an order affirming the order issued by the Board.



the trial court expressly found that, no error existed concerning the charges, that the Board acted on evidence fairly tending to sustain the charges, and that cause existed for the plaintiff's suspension. The plaintiff perfects this appeal from the entry of that order by the trial court.

The plaintiff raises three contentions in the instant appeal; (1) that the charges were insufficient to inform the plaintiff of his alleged misconduct, and to allow him to prepare a defense; (2) that the Board incorporated non-existent rules and regulations and failed to make an independent determination of what constituted "cause for suspension"; and (3) that the Board's findings were against the manifest weight of the evidence.

In addressing ourselves to the plaintiff's first contention we will limit our review of the sufficiency of the charges to those sustained by the Board since any insufficiency in the remaining charges could not have prejudiced the plaintiff. The plaintiff submits that although charges before an administrative body need not be prepared with the same nicety as a complaint at law or in chancery (Guzell v. Civil Service Commission, 17 Ill. App.3d 266, 308 N.E.2d 350), they must be sufficiently clear and specific to allow the preparation of a defense. Lloyd A. Fry Roofing Co. v. Pollution Control Bd., 20 Ill. App.3d 301, 314 N.E.2d 350; Greco v. State Police Merit Board, 105 Ill. App.2d 186, 245 N.E.2d 99, 101.

Both the charge concerning the plaintiff's conduct on March 29, 1973, and the charge concerning plaintiff's conduct on September 27, 1972, alleged "CONDUCT UNBECOMING A POLICE OFFICER". Plaintiff contends that these charges were insufficient and should have been dismissed. While the guidelines contained within the city ordinance do not specifically proscribe the emission of the smell of alcohol and the "Rules and Regulations of the Police Department of the City of Harrisburg" are conspicuously absent from the record, subsection (5) of Section 11, "CAUSES FOR REMOVAL", of the city ordinance provides that a police officer "may, in any event, be removed for":

"(5) Conduct on or off duty unbecoming a member of the Department or detrimental to the best interest of the City of Harrisburg, Illinois."

Consequently, we find that both of the preceding charges were sufficient to charge plaintiff with a possible cause for removal. Furthermore, each charge stated the date and place of the alleged misconduct and the nature of the conduct being investigated. They were sufficient to inform the plaintiff of his alleged misconduct and to enable him to



prepare a defense.

The remaining charge sustained by the Board alleged "CONDUCT UNBECOMING A POLICE OFFICER" on the grounds that the plaintiff was observed drinking a can of beer at the Saline County Court House. The plaintiff correctly asserts that this charge lacked the requisite specificity needed to enable the plaintiff to prepare a defense, in particular, it lacked the date of the alleged activity. Ordinarily, the prejudice resulting from such a deficiency would require that such charge be dismissed. The plaintiff, however, could not have been prejudiced in the instant case. According to the Rules and Regulations of the Board of Fire and Police Commissioners City of Harrisburg, Illinois, Article V, section 2, no "hearing shall be held less than five nor more than ten days after the serving or mailing of the 'notification of charges.'" The plaintiff was notified on May 1, 1973. The hearing was commenced on May 9, 1973. At the hearing on May 9, 1973, Officer Morris testified that the charge in question arose out of an incident he observed on August 22, 1972. Subsequently, the hearing was continued until May 16, 1973, seven days later. Consequently, the plaintiff had seven days notice of the date of the alleged incident, all the notice that was required by the Board's rules and regulations, before the conclusion of the hearing on May 16, 1973. On May 16, 1973, the counsel for the plaintiff stated that the plaintiff "takes the position that the charge has not been sustained by the evidence. He therefore declines to answer the charge." Although an argument can be made that this statement only referred to one charge, there is no indication that plaintiff was denied an opportunity to present a defense to the charge in question. It is evident from the record before us that the plaintiff did not believe the evidence sufficient to sustain the charges and for that reason declined to present any testimony in his own behalf. Since the alleged deficiency in the charge concerning the plaintiff's actions on August 22, 1972, was eradicated by testimony which furnished the specific date in question more than five days before the conclusion of the administrative hearing, we consider such deficiency to be harmless error. See, Sero v. City of Springfield, 6 Ill.App.3d 478. 285 N.E.2d 589.

Next, the plaintiff contends that the Board's decision incorporated non-existent rules and regulations and failed to make an independent determination of what constituted "cause for suspension." The plaintiff correctly asserts that the "Rules and Regulations of the Police Department of the said city of Harrisburg", referred to in the Board's order,



re not included in the record. While the Administrative Review Act places the responsibility of furnishing a complete record upon the Board (Ill.Rev.Stat. 1971, ch. 110, par. 272(b), we cannot say that the failure to furnish such rules and regulations prejudiced the plaintiff in view of the aforementioned city ordinance, which proscribes conduct in becoming a police officer and, thereby, provides a sufficient basis for review.

We also reject plaintiff's argument that the Board did not determine if the charges were sufficient to constitute cause for removal. The basic thrust of this argument is that the Board relied solely upon the proscriptions contained within the city ordinance and made no independent determination of cause. At the outset we note that the ordinance in question expressly provided that a police officer "may" be removed for certain enumerated offenses. A municipality may, quite properly, establish guidelines for the conduct of its police officers. (See, Hunt v. City of Peoria, 30 Ill.2d 230, 195 N.E.2d 719.) Consequently, we do not find the ordinance in question null and void as an attempt to usurp the power of the Board. Furthermore, while the Board's order reveals that it found the plaintiff in violation of certain proscriptions contained within said ordinance, its order concludes, "By reason of the findings of fact and guilt, herein, cause exists for the suspension of the Respondent." On the basis of this record we cannot say that the Board's reference to the external standards provided by ordinance prevented it from making an independent determination of "cause for suspension".

Finally, the plaintiff contends that the findings of the Board were against the manifest weight of the evidence. In our review of the Board's findings and conclusions, "The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." (Ill.Rev.Stat. 1973, ch. 110, par. 274.) Consequently, we limit our review to whether or not the Board's findings are based upon evidence fairly tending to sustain them. (Fantozzi v. Board of Fire & Police Commissioners of Villa Park, 27 Ill.2d 357, 189 N.E.2d 275.) See also, Davern v. Civil Service Com., 47 Ill.2d 469, 269 N.E.2d 713.

The first charge sustained by the Board was that the plaintiff "was guilty of drinking intoxicating liquor at the Saline County Court House while on duty and in uniform." This finding was based upon the testimony of one witness, Lynwood Morris. The relevant portion of his testimony is as follows:

" * * *



Q. Do you know the Chief of Police in this case?

A. Yes sir.

* * *

Q. Where did you see him?

A. In the Courthouse.

Q. Where?

A. In the basement?

Q. Which Courthouse?

A. Saline County.

Q. What time of day was it approximately?

A. Approximately four or around four or five, about four-fifty-five when we got back from Cairo.

* * *

Q. Was the Chief on duty?

A. He was in uniform.

Q. At the time you saw him?

A. Yes sir.

Q. Who else was present when you saw him?

A. If you don't care I would like not to make that statement, because I don't want to get anybody else involved other than myself right now.

Q. It's all right with me. I don't care. You may have to answer.

A. Well, if it's necessary I would.

Q. All right. What if anything unusual did you see about an officer of the law in uniform at 4:55 P. M. in the afternoon in the basement of the County Courthouse at Saline County, Illinois?

A. In possession of a can of beer and drinking of it.

Q. Anything else?

A. I was offered the same.

Q. You were offered the same?

A. Yes.

Q. By whom?

A. By the party that was there."

is evident from the foregoing testimony that other persons were present during this episode. It was, therefore, crucial for this witness, the sole witness on this charge, to



particularize the plaintiff as the one in possession of the can of beer. Nevertheless, the witness never identified the plaintiff as the "party" or the "officer of the law" in possession of the can of beer. Moreover, it was the attorney prosecuting the charges against the plaintiff who precipitated this ambiguity by referring to "an officer of the law" and accepting the witness' ambiguous answer, "by the party who was there." While we must accept the Board's findings as prima facie true, the record must contain evidence fairly tending to sustain each charge against the plaintiff. Since the instant record does not contain, within it, evidence sufficient to sustain a finding that the plaintiff was guilty of this charge, the Board's finding on this charge must be reversed.

The other findings against the plaintiff concern charges that the plaintiff "was guilty of coming on duty while under the influence or partially under the influence of intoxicating liquor on March 29, 1973 and September 27, 1972, in that upon the dates aforesaid Respondent emitted the odor of alcohol on duty." The Board's findings were based upon the testimony of one witness, Leon Stull. He testified that on both occasions, March 29, 1973, and September 27, 1972, he detected the odor of alcohol emanating from the plaintiff.

The witness testified that he observed the plaintiff at a church league basketball game at Malan Junior High School on March 29, 1973. He stated that he could smell the odor of alcohol on the plaintiff's breath, otherwise, the plaintiff's conduct was "normal". The witness gave his opinion that the plaintiff was under the influence of alcohol at such time. The witness further testified that he had occasion to observe the plaintiff at the Ragain inquest conducted on September 27, 1972. He stated that he could smell the odor of alcohol on the plaintiff's breath. The plaintiff's conduct was not abnormal other than the smell of alcohol. The witness gave his opinion that the plaintiff was under the influence of alcohol, that he had been drinking.

On cross-examination, the witness stated that the plaintiff's testimony at the inquest was coherent. Upon being asked the question, "If I drank one glass of beer before I came up here, would you consider me under the influence of alcohol?", the witness responded, "I could, yes." The witness was then excused. Subsequently, the witness was recalled. In response to the question, "Yet, I believe in both cases, his conduct was normal and no unusual conduct?" the witness replied, "Other than the odor of liquor on his breath, that is correct." The following colloquy then ensued,

"Q. Well, other than the smell, there was no staggering, no outward appearance of drunkenness, or . .

A. The only statement I made is that I could smell alcohol on the Chief's breath because I was close enough to talk with the man in both instances.

Q. But he did not have an outward display of vulgarity, staggering or . .

A. He didn't stagger . . .

Q. Or anything like this?

A. I didn't state the amount that he had.

Q. No, no.

A. I just said that he . . .

Q. Said he acted normal.

A. I just said that the odor of liquor was on his breath."

We can only conclude that the Board based its finding that the plaintiff was "under the influence or partially under the influence of intoxicating liquor" entirely upon Stull's testimony that on the two occasions in question the plaintiff emitted the odor of alcohol. We find Stull's testimony insufficient to sustain the Board's findings.

While being "under the influence of intoxicating liquor" is not subject to objective analysis, it has been defined generally. The primary source of our definitions concerning it has been the cases involving the statutory prohibition against driving an automobile while under the influence of intoxicating liquor. (Ill.Rev.Stat. 1967, ch. 95 1/2, par. 44 (a).) In People v. Nelson, 132 Ill.App.2d 674, 270 N.E.2d 571, the court held that,

"Being 'under the influence of intoxicating liquor' means a condition that makes a person less able, either mentally or physically, or both, to exercise clear judgment, and with steady hands and nerves, operate an automobile with safety to himself and to the public. (Citations Omitted.)" (270 N.E.2d @572.)

See also, People v. Wheatley, 4 Ill.App.3d 1088, 283 N.E.2d 279. The Supreme Court of Nebraska in Hoffman v. State, 162 Neb. 806, 77 N.W.2d 592, advanced a definition which we find even more applicable to the instant case. Therein the Court stated,

"A person is 'under the influence of intoxicating liquor' if he is under that influence to such extent as to have lost to appreciable degree normal control of his body or mental faculties, to extent that there is impairment of capacity to think and act correctly and efficiently."

Applying this general standard to the instant case we believe that the record must support the contention that the plaintiff's physical or mental capabilities were either



impaired or decreased an appreciable degree. Since there is absolutely no evidence support such a contention the Board had before it insufficient evidence to support its finding that the plaintiff was "under the influence or partially under the influence of intoxicating liquor." Consequently, we are forced to reverse the Board's finding of guilt on these remaining charges. See, Middletown v. License Appeal Commission, 20 Ill.App.3d 534, 314 N.E.2d 596.

Having decided that each of the findings of guilt entered by the Board were not supported by the record, we reverse the order entered by the circuit court of Saline County and remand this cause with directions that the circuit court vacate the order entered by the Board of Fire and Police Commissioners of the City of Harrisburg, and enter the necessary orders consistent with the relief requested.

Order reversed, remanded with directions.

DONES, P.J. and CARTER, J. concur.

PUBLISH ABSTRACT ONLY

3D
27 I.A. 288

NO. 73-286

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	}	Appeal from the Circuit
Plaintiff-Appellee,		Court of Saline County
v.	}	
HARRIS MASON BRYANT,		Honorable Jack C. Morris,
Defendant-Appellant.	}	Judge Presiding.

Mr. JUSTICE KARNS delivered the opinion of the court:

Defendant-appellant Harris Mason Bryant was convicted upon his plea of guilty in Saline County of burglary and theft under \$150. He was sentenced to three years probation for burglary and periodic imprisonment of eight months for theft. The sole contention on appeal is whether the conviction and sentence for theft must be vacated because the burglary and theft arose from a single course of conduct during which no substantial change in the criminal objective occurred.

We first note that the State has failed to appear or file a brief in this cause. This practice is not to be condoned since it forces us to act as advocate as well as reviewing court and denies the People of the State of Illinois the representation on appeal that is due them. We can and do treat the State's failure to contest this matter as a confession of error.

The theft charged herein was the objective of the burglary committed and arose from a single course of conduct. It was therefore improper to convict and sentence defendant for theft, the less serious of the two offenses. People v. Schlenger, 13 Ill.2d 63, 147 N.E.2d 316 (1958); People v. Stewart, 45 Ill.2d 310, 259 N.E.2d 24 (1970); People v. Staggs, 12 Ill.App.3d 339, 297 N.E.2d 621 (1973). The principle has been recently reaffirmed by our Supreme Court in People v. Williams, 60 Ill.2d 1, 322 N.E.2d 819 (1975).

8827 A172

The judgment of the Circuit Court of Saline County is affirmed as to the burglary conviction and reversed as to the theft conviction.

AFFIRMED IN PART; REVERSED IN PART.

CONCUR: JONES, P.J., MORAN, J.

PUBLISH IN ABSTRACT ONLY



IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILE
APR 14 1975
Walter D. Brown
CLERK OF THE DISTRICT OF ILLINOIS
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

s.

DONALD DILLARD BROWN,

Defendant-Appellant.

Appeal from the First
Judicial Circuit Court of
Pulaski County.

Honorable
C. Ross Reynolds,
Judge Presiding.

PER CURIAM:

The defendant, Donald Dillard Brown, and a co-defendant were indicted for armed robbery and rape. The co-defendant pled guilty to rape and was sentenced for a term of 8 to 12 years; the armed robbery charged was dismissed. Defendant Brown was tried by jury and convicted of rape and robbery. After a presentence hearing, he was sentenced to concurrent terms of 15 to 20 years for rape and 5 to 15 years for robbery.

Proceedings on this direct appeal were stayed pending final adjudication of defendant's post-conviction petition. His appeal from denial of that petition was affirmed by this court in People v. Brown, 12 Ill.App.3d 535, 299 N.E.2d 37; leave to appeal to the Supreme Court was denied January 30, 1974.

The sole issue presented for review is whether the sentences imposed were excessive.

At the time of the offense, defendant Brown was 19 years of age, married, and the father of one child. He had no prior convictions, and was gainfully employed. Defendant Brown was not armed and did not threaten the victim; the only weapon displayed in the commission of the offense was that of the co-defendant.

The People impose no objection to the defendant's request for modification of the sentence. Upon review of the record and consideration of our statutory and constitutional provisions pertaining to penalties which are proportionate to the seriousness of the offense and take into consideration the possibility of rehabilitation and the history and character of the defendant, we are of the opinion that modification of the sentence is

214 1893

both appropriate and warranted. Ill.Const.Art. I, Sec. 11 (1970); Ill.Rev.Stat., 1973, ch. 38, sec. 1-2(c), 1005-8-1(c)(2) and (3).

We therefore modify the sentences imposed to a minimum of 8 and a maximum of 12 years for rape, and a minimum of 5 years and a maximum of 12 years for robbery.

Affirmed as Modified.

PUBLISH ABSTRACT ONLY.

berspacher, Moran, J.J., not participating

27 I.A. 406

NO. 74-288

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH JUDICIAL DISTRICT

FILED
APR 14 1975

Walter T. Simmons
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,
Respondent-Appellee,

v.

ANDREW HARPER,
Petitioner-Appellant.

} Appeal from the Circuit Court
of Johnson County, Illinois

} Honorable Robert B. Porter,
Judge Presiding

PER CURIAM

Petitioner-appellant, Andrew Harper, and John Holmes, Jr., were convicted jointly in Cook County of murder and were sentenced to death. On appeal, the Supreme Court reversed the convictions and remanded the cause for a new trial. People v. Harper, 36 Ill.2d 398, 223 N.E. 2d 841 (1967). Both were again convicted and sentenced to 30 to 50 years. Harper's sentence was to run concurrently with a sentence of 100 to 150 years imposed for a prior murder conviction.

Petitioner is currently incarcerated in the Illinois Department of Corrections Correctional Center, Vienna, Illinois. He made application to the Illinois Parole and Pardon Board for parole on both offenses. On December 12, 1973, his application for parole was denied by the Board. The Board stated that parole at that time would "deprecate the seriousness of the offense" and "would not deter the inmate or others from committing such serious offenses."

On March 22, 1974, appellant filed a pro se petition for a writ of habeas corpus in the circuit court of Johnson County alleging that the Parole and Pardon Board, in denying his application for parole, had applied a standard which did not exist at the time of his sentence, and that, therefore, he remained incarcerated through the application of an ex post facto law. The circuit court held a hearing on the petition, at which the appellant was present, and on May 1, 1974, granted the People's motion to dismiss and denied the petition. This appeal followed.

The Office of the State Appellate Defender, Mt. Vernon, counsel for petitioner on appeal, filed a motion pursuant to Anders v.

2017-18

California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), requesting leave to withdraw as counsel, alleging that no merit to the appeal exists. Counsel has provided this court with an extensive memorandum of law in support of its position and has served petitioner with copies of all documents. The appellant has requested that his petition for writ of habeas corpus filed in the Circuit Court be permitted to stand as his Brief and Argument on appeal.

We have carefully reviewed the record and agree with counsel that no merit exists. Appellant's petition sought a writ of habeas corpus pursuant to Ill.Rev.Stat. 1969, ch. 65, sec. 22(2) and (3). Examination of the petition reveals that the appellant relies solely on subsection (2), and alleges that, absent the wrongful application of an ex post facto law, he would be entitled to discharge. Assuming, arguendo, that an ex post facto law was applied by the Board in denying the appellant parole, he still would not be entitled to discharge. At most, he would be entitled only to reconsideration of his parole application. People ex rel. Jones v. Brantley, 45 Ill.2d 335, 259 N.E.2d 33 (1970). The appellant was entitled to have his application for parole considered under the proper standards or criteria. We are aware of People ex rel. Weaver v. Longo, 57 Ill.2d 67, 309 N.E.2d 581 (1974), wherein the court granted mandamus relief to one denied parole based on improper eligibility criteria. The Court noted, however, that the petitioner had been denied consideration pro forma and that the extent of his relief was consideration of his parole application on its merits. In the instant case, petitioner has been afforded the consideration provided by statute and Parole and Pardon Board regulations. Thus, neither habeas corpus nor mandamus relief is available. The motion of the State Appellate Defender to be allowed to withdraw as counsel on appeal is allowed and the judgment of the Circuit Court of Johnson County is affirmed.

AFFIRMED.

Publish Abstract only.

CONCUR: _____

Eberspacher, J. and Moran, J., not participating.



IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)
) Appeal from the Circuit Court of Massac
 Plaintiff-Appellee,) County.
 vs.)
)
 JAMES T. TAYLOR,) Honorable Robert H. Chase
) Judge Presiding.
 Defendant-Appellant.)

FILED
 APR 11 1975

Mr. JUSTICE G. MORAN delivered the opinion of the court:

Walter T. Simmons
 FIFTH DISTRICT OF ILLINOIS
 CLERK APPELLATE COURT

Defendant appeals from a judgment of the trial court finding him guilty of the crime of illegal possession of cannabis in violation of Section 704(e), Chapter 56-1/2, Ill. Rev. Stats. 1971.

Defendant pled guilty to the charge after a negotiated plea and was committed to the Department of Corrections, Adult Division, for a minimum of one year and a maximum of three years.

Defendant contends that his plea is invalid because the trial court did not explain the nature of the charge to him as required by Supreme Court Rule 402(a)(1) before accepting his plea.

Supreme Court Rule 402 (Ill. Rev. Stat., 1973, ch. 110A, par. 402) provides in part:

"In hearings on pleas of guilty, there must be substantial compliance with the following:

(a) Admonitions to Defendant. The court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) The nature of the charge; * * * ."

Prior to the defendant's plea of guilty, the state announced that the defendant would plead guilty to the indictment, be sentenced from one to three years, and that other charges concerning unlawful possession of amphetamines and bail jumping would be dismissed. The defendant then confirmed this agreement. He agreed to waive a presentence investigation. The court then said:

"The charge in the bill of indictment is Unlawful Possession of Cannabis, in that on the 17th day of September, 1972, you did have in your possession more than 500 Grams of a substance containing

Cannabis, otherwise than as authorized in the Cannabis Control Act.
Do you understand that charge, Mr. Taylor:

Defendant: Yes sir."

The court explained the minimum and maximum sentence, and the defendant
pled guilty. Then the Court said:

"It states substantially that on September 17, 1972, in Massac
County, Illinois, you knowingly had in your possession more than
500 grams of a substance containing cannabis commonly known as
marijuana, otherwise than as authorized in the cannabis control act,
and it carries a penalty of not less than 1 nor more than 10 years in the
penitentiary or a fine not to exceed \$10,000, or both, plus a 3 year
parole period in the event you are sentenced, at the time of your re-
lease. Do you understand those penalties?

Defendant: Yes, sir."

The defendant said he was satisfied with counsel. The rights to remain
silent, to plead guilty or not guilty, to trial by jury, and to confront witnesses were
explained. The court determined that no promises other than those contained in the
negotiations, or force or threats, were used to obtain the plea.

The court then inquired if there was a factual basis for the plea and the
following transpired:

"Mr. Neely: Yes, first we have the lab report dated October 24th which
was filed by Daniel Lecocq which confirms that the material con-
fiscated is cannabis and does verify the weight as being 500 grams
as charged. Mr. LeQuoc (sic) if present would so testify under Oath in
accordance with this Report. Also Troopers Dunning and Goss ob-
served a vehicle in which Mr. Taylor and Mr. Custer were riding
and while so observing, noticed an object fall from the vehicle,
the vehicle was stopped and one of the officers went back to where
the object had fallen on the ground and found it to be a plastic bag
containing a leafy substance. The officers then approached Mr.
Taylor and found Marijuana in his possession. The officers if they were
to appear would so testify under Oath.

The Court: Is that substantially true, Mr. Foster?

Mr. Foster: Yes.

The Court: Mr. Taylor?

Mr. Taylor: Yes sir.

The Court: Let the record show the Court finds a factual basis for the
plea and it is accepted of record."

Under the above circumstances, it would be difficult to comprehend how the
defendant would not understand the nature of the charge. In our opinion there was sub-
stantial compliance with Supreme Court Rule 402(a)(1).



Defendant also contends the sentence is excessive. Our examination of the record discloses that this contention is lacking in merit..

Judgment affirmed.

CONCUR:

Jones, Karns, JJ.

PUBLISH ABSTRACT ONLY.



74-254

STATE OF ILLINOIS

People vs. Andrew Nash



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,
on the 1st Day of January in the Year of our Lord one thousand
nine hundred and seventy-five within and for the Third District
of Illinois:

Present— PC

HON. ALLAN L. STOUER, Presiding Justice

HON. JAY J. ALLOY, Justice

HON. RICHARD STENGEL, Justice

HON. TOBIAS BARRY, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on
April 16, 1975 the Opinion of the
Court was filed in the Clerk's Office of said Court, in the words
and figures following, viz:



No. 74-254

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1975

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit
	)	Court of the 12th Judicial
Plaintiff-Appellee	)	Circuit, Will County, Ill.
)	
v.)	
)	
ANDREW NASH,	)	Honorable
	)	Thomas W. Vinson,
Defendant-Appellant	)	Presiding Judge

PER CURIAM

Abstract

Andrew Nash was indicted for the offense of armed robbery on January 17, 1973. The indictment arose out of an incident in which Nash allegedly robbed a cashier at a Sears store while threatening her with a gun. The defendant pled not guilty and after a jury trial was convicted of the lesser included offense of robbery. Following a presentence report and sentencing hearing, the court sentenced defendant to a term of not less than six (6) nor more than twenty (20) years.

A timely notice of appeal was filed and the Office of State Appellate Defender was appointed to represent defendant on his appeal.

It appears from the record that Nash, prior to trial, filed a motion to suppress identification and two motions to suppress evidence, with all three motions being denied. At trial, there were two uncontradicted eye witness identifications of Nash as the robber. Nash did not testify and did not offer any testimony which contradicted any of the State's evidence. The jury returned a verdict of guilty on the lesser included offense of robbery, apparently concluding that the State had failed to prove that Nash was armed.



Counsel appointed for Nash accordingly informed Nash that the Office of the State Appellate Defender would move for leave to withdraw. The motion for leave to withdraw was filed by the Office of the State Appellate Defender pursuant to Anders v. California (1967), 388 U.S. 738, and was accompanied by a brief in support thereof. The Appellate Defender asserts that after careful examination of the record, a conclusion must be reached that an appeal would be wholly frivolous and without possibility of success.

It is obvious that the denial of the motion to suppress identification, if erroneous, was harmless error, since an independent basis for the subsequent in-court identification did exist. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); Peoria v. Blumenshine, 42 Ill.2d 508, 250 N.E.2d 152 (1969).

The motion to suppress evidence alleged that the consent to search Nash's hotel room was involuntary (\$300 in cash, allegedly taken from Sears, was discovered as a result of the search - R.69). Nash claimed that the mere presence of six police officers in his hotel room effectively made it impossible for him to refuse to consent to the search, i.e., that his will was overborne. While such circumstances do indeed render suspect any purported consent given (See Schneckloth v. Bustamonta, 412 U.S.218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)), they are not conclusive evidence of an illegal search.

In any event, the failure to suppress the evidence seized, if erroneous, must be labeled as harmless in view of the overwhelming evidence of guilt.

The sentence of six (6) to twenty (20) years was within the statutory limits, Ill. Rev. Stat. 1973, c.38, Sec. 1005-8-1(b)(3) and, in view of Nash's extensive prior conviction



record, cannot be termed as excessive.

From a review of the record in this cause, we concur in defense counsel's conclusion that there are no arguable errors to be considered on appeal and that a continuation of the appeal would be wholly frivolous and without possibility of success.

The motion of the State Appellate Defender to withdraw as counsel for Andrew Nash in this cause is allowed and the appeal is dismissed.

Appeal dismissed and withdrawal motion allowed.



Rar Essen

3D

73-242

3D
27 I.A. 487

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice
Honorable WALTER DIXON, Justice
Honorable THOMAS J. MORAN, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On April 15, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

Yonkers, N.Y.

January 1, 1900

Dear Sir,

I have the honor to acknowledge the receipt of your letter of the 29th inst. in relation to the above matter. The same has been forwarded to the proper authorities for their consideration. I am, Sir, very respectfully,
Yours truly,
J. J. [Signature]

Very truly,
J. J. [Signature]

Abstract

No. 73-242

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

EARL BLOCK,)	
)	
Plaintiff-Appellant,	)	Appeal from the
	)	Circuit Court of
v.	)	DuPage County,
	)	Illinois.
EDWARD ZAHOUR, KENNETH MILES,)	
PHILIP F. LOCKE and WAYNE SHIMP,)	
)	
Defendant-Appellees.)	

JUSTICE THOMAS J. MORAN delivered the opinion of the court:

Plaintiff, pro se, appeals claiming that the trial court which presided in the present cause was prejudiced and erred by dismissing plaintiff's complaint.

Plaintiff filed a three-count complaint against his former attorney, his former wife's attorney, the sheriff and the judge who had entered a decree of divorce involving the plaintiff.⁽¹⁾ Count I commences with a statement that plaintiff was not submitting the suit to any judge within the circuit, and then relates that the custom and practice of the divorce court in the 18th Circuit was to use the county jail as a debtors' prison in that persons found in arrears in payment of money under a divorce decree are placed in jail; that his former wife's attorney and the judge, with the help of the sheriff, threatened him with arrest for failure to pay \$8000 required under plaintiff's divorce decree; that he does not have the money; that as a result of the threats he is suffering mental anguish; that

the custom and practice followed by the divorce court is unconstitutional; that the defendants owe him a duty not to threaten him in such manner; that they are doing it wilfully and maliciously and he is therefore entitled to exemplary damages in the amount of one million dollars and a like amount for ordinary damages. Count II charges the judge and the wife's former attorney. After realleging parts of Count I, plaintiff relates that the judge stated to him, "You come back here with a lawyer," thereby soliciting law work on behalf of lawyers and that he inferred the statement to also mean that unless he returned with a lawyer he would be imprisoned; that the statement was malicious, therefore entitling him to exemplary damages of one million dollars and ordinary damages of one million dollars. Count III is directed against all but the sheriff. Therein, plaintiff relates that defendants forced him, under duress, fraud and deceit, to agree to a divorce decree promulgated in a secret meeting; that his former attorney demanded that plaintiff agree to conditions in the decree; that the attorney represented to him that the judge would not consider certain alleged acts committed by plaintiff's former wife and that, as the result of a secret meeting had with the judge present, his attorney told him that the judge would compel plaintiff to pay \$7000 irrespective of the evidence; that the judge issued the decree of divorce under a sham and pretense of authority; that the decree contained misstatements, relating that plaintiff entered into an oral settlement agreement, whereas the agreement was extracted by fraud, deceit and duress and was concocted by the three defendants in a secret meeting; that the defendants knew the decree was a fraud; that as a result of defendants' actions, he was damaged by losing his job and his profession, was forced into a life of substandard existence and deprived of the affection and companionship of his children; that the three defendants acted maliciously; that plaintiff was entitled to exemplary damages of one million dollars and ordinary damages of a like amount.

3-242

The judge filed a motion for judgment on the pleadings and the three other defendants filed motions to dismiss. Arguments were heard by the trial court assigned to the case pursuant to Supreme Court order. That court allowed the motions and plaintiff appealed.

The question, common throughout, is whether the complaint states a cause of action against any of the defendants. Since the case is presented for review from orders allowing motions to dismiss and judgment on the pleadings, all well pleaded facts and all reasonable inferences drawn therefrom must be accepted as true. (Gertz v. Campbell, 55 Ill. 2d 84, 87 (1973); James Coates Mtrs. v. Avis Rent-A-Car System, 19 Ill. App. 3d 919, 920-21 (1974).) Nevertheless, a cause of action should be dismissed on the pleadings if it appears that no set of facts can be proved which will entitle the plaintiff to recover. (Edgar County Bk. & T. Co. v. Paris Hospital, 57 Ill. 2d 298, 305 (1974).) Although, under the rule of liberal construction, formal or technical allegations are unnecessary, the complaint must minimally allege facts sufficient to state a cause of action. It is a fundamental rule that the test of a complaint's sufficiency is whether or not the necessary elements or essentials of a cause of action are alleged. Dear v. Locke, 128 Ill. App. 2d 356 (1970).

With the case law recited in mind, we have diligently reviewed plaintiff's complaint and find that while he has made certain conclusory statements, plaintiff has failed, on a factual basis, to set forth the necessary elements of any cause of action. The trial court was therefore correct in its judgments.

Plaintiff argues that the trial court in the present case threatened him with contempt and otherwise showed prejudice, thereby precluding plaintiff from receiving a fair hearing on defendants' motions. Because the issue is raised for the first time in this

court, it would, ordinarily, be deemed waived but because plaintiff is without counsel, we elect to respond. The presiding judge in the instant cause was assigned, by Supreme Court order, to hear the arguments in order to assure plaintiff that his cause would be considered fairly and without bias or prejudice. Comments by that judge, made after the case had been determined, were in the nature of advice for the benefit of the plaintiff since he was acting without counsel. The advice was to the effect that any future filing of pleadings which contained scandalous, insulting and contemptuous language might subject plaintiff to contempt proceedings. From our reading, the trial court was attempting to be helpful rather than prejudicial. The totality of the record reveals that plaintiff received a fair hearing and his contention is therefore devoid of merit. See People v. Parker, 328 Ill. App. 46, 57-58 (1946), aff'd. 396 Ill. 583, 586-87 (1947), aff'd. 333 U.S. 571, 92 L. Ed. 886, 68 S. 708 (1948).

Judgment affirmed

DIXON, P.J., and HALLETT, J., concur

FOOTNOTE

- (1) "Judge", a defendant herein, as distinguished from the "trial court" in the present cause.

Barless

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27 I.A. 526



No. 60773

L. W. PAUL SUPPLY COMPANY, INC.,)
an Illinois corporation,)
Plaintiff-Appellant,)
v.)
LEON MEYER,)
Defendant-Appellee.)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

HONORABLE
DAVID A. CANEL,
PRESIDING.

Mr. JUSTICE LORENZ delivered the opinion of the court:

Plaintiff appeals from a judgment entered in defendant's favor after a trial on the merits contending that the judgment is invalid because the trial judge erred in denying a motion for a change of venue.

The record indicates that after plaintiff answered ready for trial, defendant waived his request for trial by jury. Immediately thereafter, plaintiff orally requested a change of venue and filed a verified handwritten petition for a change of venue signed by plaintiff's president. The petition was based upon the belief that the trial judge was prejudiced against plaintiff and that his prejudice first became known to plaintiff on the morning of trial. The court denied the petition and proceeded with trial without a jury, ultimately rendering judgment for defendant.

OPINION

Plaintiff has perfected its appeal from the instant judgment. However, defendant has not appeared and has not filed an answering brief. The time for defendant to file such a brief expired long ago. (Ill. Rev. Stat. 1973, ch. 110A, par. 343.) In such circumstances, this court, in its discretion, may either reverse the order appealed from or consider the merits of the case. Ridge Manor Convalescent Home v. City of Chicago, 4 Ill. App. 3d 1077, 283 N.E.2d 272.

In either event, in the instant case, reversal is required. The Change of Venue Act (Ill. Rev. Stat. 1973, ch. 146.) specifies



the procedure to be applied in requesting a change of venue. The record before us indicates that the proper procedure was followed. Illinois courts have determined that petitions such as the one in the instant case should normally be granted and judgments entered after such petitions have been improperly denied are invalid. (See e.g., Pennema v. Joyce, 6 Ill. App. 3d 108, 285 N.E.2d 156.) In the absence of an answering brief and upon the record before us, the judgment of the circuit court must be reversed and the cause remanded with directions that it be transferred to another judge for a new trial.

Reversed and remanded with directions.

DRUCKER and SULLIVAN, JJ., concur.

[PUBLISH ABSTRACT ONLY.]



Bar down.

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27 I.A. 529



NO. 60183

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM
)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	_____
)	
DAISY JOHNSON,	)	HONORABLE
	)	MILTON H. SOLOMON,
Defendant-Appellant.	)	PRESIDING.

BEFORE DOWNING, P.J., LEIGHTON and HAYES, JJ.

Per Curiam

The defendant, Daisy Johnson, was convicted in a bench trial of theft of two half gallons of liquor of a value less than \$150 from a Walgreen Drug Store (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1)) and sentenced to one year in the County Jail. Her only contention on appeal is that she was not proved guilty beyond a reasonable doubt.

Gloria Sheer testified that on October 1, 1971, she was working as a cashier in the liquor department at Walgreen's Drug Store, 83 Old Orchard in Skokie, when the defendant and another girl came in. She gave them some information on mixed drinks. While she was waiting on the defendant and the other girl, she had "a line of customers" and left to wait on them. When she later looked up she saw the girls running out of the store carrying bottles of liquor which she described. She ran after them, saw them get into their car and she obtained their license number. She identified the defendant in court as one of the girls. The defendant testified in her own behalf that she was at the store with Anne Tripp to purchase some drinks and she asked "the lady" where she could buy some mixed drinks and the lady left, waited on some customers and returned. At this point she looked up and heard some bottles rattling and saw Anne Tripp run out the door. The lady followed Anne Tripp out the door. Defendant denied that she took any bottles.

The evidence here was in conflict. Although the defendant admitted being at the store and talking with "the lady," she denied that she also took and fled with the liquor bottles. The question for the trial judge was whether Gloria Sheer or the defendant was the more credible witness and we cannot say he committed any error in choosing to believe Gloria Sheer. It is the function of the trial court to determine the credibility



of the witnesses and the weight to be afforded their testimony and a reviewing court will not substitute its judgment for that of the trier of fact unless the evidence is so unreasonable, improbable and unsatisfactory as to leave a reasonable doubt as to the defendant's guilt.

(People v. Catlett (1971), 48 Ill. 2d 56, 63-64, 268 N. E. 2d 378.)

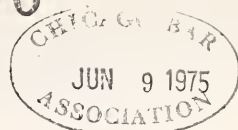
Since there is no reasonable doubt about defendant's guilt, we affirm the theft conviction.

Although not argued in the briefs, we note that the one year sentence imposed on the defendant exceeds the maximum provided for in the new Unified Code of Corrections for a Class A misdemeanor which may be for any term "less than one year." (Ill. Rev. Stat. 1973, ch. 38, par. 16-1(e)(1), and par. 1005-8-3(a)(1).) We therefore vacate and set aside the sentence. The cause is remanded to the circuit court of Cook County with directions to re-sentence the defendant in accord with the applicable provisions of the Unified Code of Corrections.

Affirmed in part; Reversed in part and remanded.

Abstract only.





Nos. 60489, 60620, 60621,
60622, 60623 (Consolidated)

PEOPLE OF THE STATE OF ILLINOIS,)	
Plaintiff-Appellant,)	
v.)	
ANGELO NIEVES,	)	APPEAL FROM THE
Defendant-Appellee.	)	CIRCUIT COURT OF
	)	COOK COUNTY
IN THE MATTER OF A SEARCH WARRANT,	)	HONORABLE
Appellant,	)	JAMES E. MURPHY,
v.	)	JUDGE PRESIDING.
ANGELO NIEVES,)	
Appellee.)	

Before Downing, P.J., Leighton, and Hayes, JJ.

Per Curiam

The State, pursuant to Supreme Court Rule 604(a)(1) (Ill. Rev. Stat. 1973, ch. 110A, par. 604(a)(1)), appeals from an order of the circuit court of Cook County quashing a search warrant and suppressing evidence. The search warrant was originally issued to search the defendant, Angelo Nieves, and apartment #106 at 3941 North Pine Grove, Chicago, Illinois, for heroin, the possession of which constitutes the offense of possession of a controlled substance. The trial court granted defendant's motion to quash the search warrant and suppress evidence. The State appeals contending that the search warrant was improperly quashed by the trial court. Consolidated with the appeals are four additional criminal charges arising out of the same search warrant.

The affidavit in support of the complaint for a search warrant stated:

"I, Inv. D. Muchowicz, being a police officer for the City of Chicago had a conversation with a reliable police informant about narcotic violations on 24 Oct 1973 and on 25 OCT 1973. I have known this informant for the past 2 1/2 months during which period of time I have had three other conversations with this informant regarding narcotic violations. As a result of these other three conversations, I have effected three arrests and I have recovered narcotic contraband in each and every instance. Of these three arrests all three cases have been continued in Narcotics Court and are still pending. This informant stated to me that on 24 Oct 1973 while this informant was in Apt. #106 located at 3941 N. Pine Grove, Chicago, Illinois a M/Latin known to this informant as Angelo NIEVES, sold two ounces and some 30 or so grams of heroin to various unknown persons while this informant was present. This informant further stated that Angelo NIEVES told this informant that he was going to receive a large quantity of heroin from 18th St. on 25 OCT 1973. This conversation took place on 24 Oct. 1973. On 25 OCT 73 this same



informant told me that while this informant was in Apt. #106 located at 3941 N. Pine Grove, Chicago, Illinois on 25 OCT 1973 Angelo NIEVES sold this informant a quantity of heroin for the sum of \$45.00 USC. When this informant left the above described apt. this informant observed Angelo NIEVES in the possession of and under the control of a larger quantity of brown heroin which was contained in plastic bags, on 25 OCT 1973. This informant also stated that this informant then used contents of heroin sold to this informant by Angelo NIEVES M/Latin and stated that it is in fact heroin from this informant's past experience with heroin as a user."

Defendant on appeal argues that the trial court properly quashed the search warrant on the basis that the affidavit in the complaint for search warrant failed to state the underlying circumstances upon which the informant concluded that there were narcotics in the possession of the named offender at the specified apartment and that the warrant was insufficient to connect the alleged offender and the contraband with the apartment specified in the warrant. The rule is well established in this state that applications for search warrant must be tested in a common sense and realistic fashion. People v. McGrain (1967), 38 Ill. 2d 189, 230 N.E.2d 699; People v. Levin (1st Dist. 1973), 12 Ill. App. 3d 879, 299 N.E.2d 336.

In the case at bar, the affidavit in support of the complaint for search warrant stated that on two occasions the informant was in a specified apartment; that on October 24, 1973 he observed the defendant sell heroin to other people; and on October 25, 1973 he himself purchased heroin from the defendant. The informant's statement describing the offender as a male Latin known as Angelo Nieves was sufficient to establish the identity of the offender. (People v. Ragusca, et al., ___ Ill. App. 3d ___, ___ N.E.2d ___ (Nos. 60396-60408, decided January 23, 1975).) The informant's statement that, after purchasing heroin from the defendant on October 25, 1973, he left the apartment and at that time the defendant still had an additional quantity of heroin under his control, was sufficiently detailed so as to enable the issuing judge to reasonably determine that



there was heroin in the apartment. (People v. Ranson (1st Dist. 1972), 4 Ill. App. 3d 953, 282 N.E.2d 462.) Similarly, the informant's statement that he knew the item purchased to be heroin because he had used it was sufficient to establish that a controlled substance was involved. People v. Ragusca, et al., supra.

While defendant argues that there was no allegation in the affidavit to show that the specified apartment was the defendant's apartment, such an allegation is unnecessary. (People v. Ragusca, et al., supra.) Defendant also urges that there was no corroboration of the informant's statement. However, it is well established that independent corroboration of a reliable informer's information is not required. (People v. Ranson, supra; People v. Packer, ___ Ill. App. 3d ___, ___ N.E.2d ___ (Nos. 60355-60361, decided December 19, 1974).) Here, the statement that the informant was in the apartment and observed the defendant sell heroin on two consecutive days and that, when the informant left the apartment after purchasing heroin on October 25, 1973, defendant still had an additional quantity of heroin in his possession, was sufficient to justify the issuance of the search warrant. People v. Ragusca, et al., supra.

Defendant's next contention is that the complaint for search warrant failed to provide any measure by which the informer's reliability could be judged. Defendant argues that the complaint did not state that the police officer had only three previous conversations with the informant, and failed to specify whether the three arrests resulted from one of the conversations or one arrest from each of the three conversations. Defendant also argues that, having used the heroin, the informer was obviously under the influence of heroin and was therefore unreliable.

In the case at bar, the affidavit, in support of the complaint for search warrant, stated that the police officer had known the informant " * * * for the past two and a half



months during which period of time I have had three other conversations with this informant regarding narcotics violations." The affidavit then went on to state that as a result of the three conversations the officer had effected three arrests and recovered narcotics in each instance. A common-sense reading of these statements clearly indicates that each of the three conversations had resulted in an arrest and in the confiscation of narcotics.

Defendant's argument that the informer was under the influence of heroin at the time of the conversation and was therefore unreliable is mere speculation totally unsupported by the record. The fact that the informer had used the narcotics does not necessarily render his information unreliable. (People v. Packer, supra.) The rule is now settled in this state that to establish the reliability of an informer, convictions resulting from his information are not always necessary. (People v. Lawrence (1st Dist. 1971), 133 Ill. App. 2d 542, 273 N.E.2d 637; People v. Packer, supra.) Here, the affidavit in a complaint for search warrant sufficiently established the reliability of the informant. People v. Ragusca, et al., supra.

Defendant's final contention on appeal is that the trial court properly quashed the search warrant because the affidavit in the complaint for search warrant was so vague that perjury could not be assigned to its allegations and defendant was thereby denied his only recourse based upon a false affidavit. Here, the affidavit set forth that the police officer had previously received reliable information from an informant. It sufficiently detailed the previous information received so as to demonstrate reliability of the informant. The affidavit then set forth the informant's statements revealing the underlying circumstances justifying the issuance of a search warrant. From the totality of the information contained in the affidavit, the issuing judge was clearly able to make an independent evaluation on the reliability of the informant and reasonably conclude that there



was contraband to be seized in the stated premises. (Aguilar v. Texas (1963), 378 U.S. 108; Spinelli v. United States (1968), 393 U.S. 410.) The search warrant was properly issued.

For the reasons stated, the order of the circuit court of Cook County quashing the search warrant and suppressing evidence is reversed and each cause is remanded for further proceedings not inconsistent with this opinion.

Order reversed;
Causes remanded.

(Publish abstract only.)



NO. 60679

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY
)	
vs.)	_____
)	.
CYNTHIA DAVIS,	)	HONORABLE
	)	DAVID CERDA,
Defendant-Appellant.	)	PRESIDING.

BEFORE STAMOS, LEIGHTON and HAYES, JJ.

Per Curiam

Cynthia Davis, defendant, was found guilty after a bench trial of the crime of prostitution (Ill. Rev. Stat. 1973, ch. 38, par. 11-14(a) (1)). She was sentenced to a term of seven days in the House of Correction. Defendant appeals arguing that the evidence was insufficient to establish her guilt beyond a reasonable doubt.

At trial, Chicago Police Officer William T. Munde testified that in the early morning hours of October 12, 1973, he was investigating prostitution activity. At approximately 2:45 a.m., he was driving alone in an unmarked vehicle in the vicinity of 220 West Division Street when he observed the defendant walking westbound. As Officer Munde started to pass by defendant, she motioned for him to pull over to the curb. Officer Munde stopped and defendant entered his vehicle. Defendant asked Officer Munde if he was looking for a date. Officer Munde replied that he was, and defendant stated that for \$25 he could have sexual intercourse with her. Officer Munde agreed to the price. Defendant informed him that they could get a cheap room at the LaSalle Hotel, at approximately 821 North LaSalle, Chicago, Illinois. Officer Munde then identified himself as a police officer and placed the defendant under arrest. During the incident Officer Munde's partner was not present.

Cynthia Davis, defendant, testified that she lived at 923 North



Sedgwick, Chicago, Illinois. During the evening hours of October 11, 1973, she was at an Old Town lounge with her boyfriend. After an argument with her boyfriend, defendant left the lounge alone. As she began walking down Division Street, toward her home, Officer Munde and a second man pulled up in a car. Officer Munde began speaking to the defendant and started caressing her. Defendant stated that she panicked and thought the men were going to rape her or kill her, so she began to get loud with them. Defendant testified that the arresting officer searched her purse and in finding only two dollars commented on how little she had made. Defendant denied that she ever agreed to perform an act of sexual intercourse for money.

Defendant's first contention on appeal is that the evidence of her good character was sufficient to establish a reasonable doubt as to her guilt. Defendant urges that the assistant state's attorney's statement in aggravation, that the defendant had no previous arrests, established that she was not a prostitute and constitutes evidence of good character. This evidence was not presented during the trial and, therefore, could not properly be considered by the trial judge in determining defendant's guilt or innocence. Further, the fact that the defendant may or may not have been previously arrested for any crime is not in any manner relevant to her guilt or innocence for the crime charged.

The rule is well established that in a bench trial it is the responsibility of the trial judge to determine the credibility of witnesses and the weight to be given to their testimony. Only where the evidence is so unsatisfactory as to raise reasonable doubt as to defendant's guilt will the findings of the trial court be disturbed. (People v. Clark, 52 Ill. 2d 374, 288 N. E. 2d 363; People v. Holmes, 6 Ill. App. 3d 254, 285 N. E. 2d 561.) The testimony of a single witness is sufficient to sustain a conviction if positive and credible. People v. Abrams, 21 Ill. App. 3d 734, 316 N. E. 2d 5; People v. Garmon, 19 Ill. App. 3d 192, 311 N. E. 2d 299.

In the case at bar, Officer Munde testified that he was motioned over to the curb by the defendant who entered his vehicle and agreed to perform an act of sexual intercourse for the sum of \$25. While defendant argues that she lived in the area and it would therefore be unreasonable for her



to solicit for prostitution in that area, this at best presents a question of credibility which is for the trier of fact to determine. Where the trial judge sitting as trier of fact is presented with conflicting testimony, the judge may believe the complainant and disbelieve the defendant.

People v. Henry, 3 Ill. App. 3d 235, 278 N. E. 2d 547.

Defendant also argues that the State's failure to call Officer Munde's partner, who defendant testified was with Officer Munde at the time of the occurrence, as a witness in rebuttal, creates a reasonable doubt as to her guilt.

The defendant in her brief concedes that Officer Munde's partner was present in the courtroom at the time of the trial. Under these circumstances he could have been readily called as a witness by the defendant. Where evidence is equally available to both parties, the non-production of that evidence does not raise an inference that the evidence would have been unfavorable to the State. People v. Lewis, 14 Ill. App. 3d 237, 302 N. E. 2d 157.

In addition, the rule is well established that the State is not obliged to produce every witness to a crime. (People v. Carruthers, 18 Ill. App. 3d 255, 309 N. E. 2d 659; People v. DeSavieu, 11 Ill. App. 3d 529, 297 N. E. 2d 336.) Here, the State produced the testimony of Officer Munde. His testimony was positive, credible and sufficient to establish defendant's guilt beyond a reasonable doubt.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Abstract only.



Barless

3D
27 I.A. 533



59365

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM
Plaintiff-Appellee,)	CIRCUIT COURT,
v.)	COOK COUNTY.
RAYMOND REEVES,)	
Defendant-Appellant.)	HONORABLE
	JOHN J. CROWLEY,
	PRESIDING.

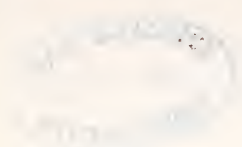
Mr. JUSTICE JOHNSON delivered the opinion of the court:

Raymond Reeves and two others were arrested on December 30, 1972 and charged with theft less than \$150. In a bench trial before the Honorable John J. Crowley, defendant was found guilty and sentenced to a term of 1 year in the County Jail.

Defendant's appointed counsel, the public defender of Cook County, filed a motion and brief for leave to withdraw as counsel pursuant to Anders v. California (1967), 386 U.S. 738, 18 L.Ed. 2d 493, 87 S.Ct. 1996. Counsel represents that no errors or irregularities appear in the record which would support the reversal of defendant's conviction on appeal. The only available issue in this appeal, argues counsel, is whether the evidence proved defendant guilty beyond a reasonable doubt. Citing numerous authorities, counsel believes that this issue would also be futile if argued on appeal.

On September 24, 1973, copies of counsel's motion and brief were mailed to the defendant. He was further advised by this court that he had until December 15, 1973 to file any points in support of his appeal, after which date the court would fully examine all proceedings and decide whether the appeal is frivolous. Defendant has not responded.

We have carefully reviewed the record and find no grounds for appeal which are not frivolous. Therefore, the motion of appointed counsel for leave to withdraw is granted, and the



judgment of the circuit court of Cook County is affirmed.

Motion allowed.
Judgment affirmed.

DIERINGER, P.J. and ADESKO, J., concur.

Abstract only.



3D
27 I.A. 534



No. 60106

PEOPLE OF THE STATE OF ILLINOIS,)
) APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,)
) COURT OF COOK COUNTY.
v.)
) HONORABLE
WALTER CLARK,) PAUL F. GERRITY,
) PRESIDING.
Defendant-Appellant.)

Before MCGLOON, P.J., McNAMARA and MEJDA, JJ.

PER CURIAM:

Defendant was found guilty after a bench trial of the crime of aggravated assault. (Ill.Rev.Stat. 1973, ch.38, par.12-2(a)(1).) He was placed on probation for a period of one year with the condition that the first thirty days be served in the House of Correction.

Defendant appeals arguing (1) that the requirement that he serve the first thirty days in the House of Correction as a condition of probation is improper under the Unified Code of Corrections and (2) that when he is resentenced the penalty must be no greater than the original sentence and he is entitled to receive credit for the time served under his original sentence. Since defendant does not challenge the sufficiency of the evidence against him, a detailed recitation of the facts is unnecessary.

Defendant's first argument is that the condition of his probation that he serve the first thirty days in the House of Correction is improper. Under the Unified Code of Corrections as originally enacted a defendant could not be incarcerated as a condition of probation except under Article 7 which provided only for periodic imprisonment. (Ill.Rev.Stat. 1972 Supp., ch.38, par. 1005-6-3(d).) While the statute has now been amended to provide for imprisonment for a period of up to six months (Ill.Rev.Stat. 1973, ch.38, par.1005-6-3(d)) that amendment did not become effective until July 1, 1974 (People v. Braddock (1974), 17 Ill.App.3d 73, 308 N.E.2d 74). Defendant was convicted and sentenced on December 12, 1973. Since the defendant was sentenced prior to the effective date of the new statute, he was entitled to the benefits of the Unified Code of Corrections as it was originally enacted. The



condition that defendant serve the first thirty days in the House of Correction is, therefore, improper. Defendant asks that his case be reversed and remanded for resentencing. However, courts of this State have held that the proper remedy is not to remand for resentencing but to vacate the condition that the defendant be incarcerated. People v. Grant (1974), 57 Ill.2d 264, 312 N.E. 2d 276; People v. Braddock, supra; People v. Claudie (1973), 13 Ill.App.3d 537, 300 N.E.2d 791.

Defendant's second argument is that assuming his case were to be remanded for resentencing, his new sentence cannot be greater than the original sentence and he is entitled to a sentence credit for the time served under his original sentence. Since we have determined that the defendant's case need not be remanded for resentencing, this argument is rendered moot.

For the foregoing reasons, we hereby modify the order of probation by eliminating the condition that defendant serve the first thirty days in the House of Correction. As modified the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed
as modified.

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60030 through 60038
(consolidated)

3D
27 I.A. 535

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellant,)
)
v.)
)
LILLIAN WILSON, JAMES WILSON,)
and ROBERT PAYNE,)
)
Defendants-Appellees.)

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

HONORABLE
JAMES E. MURPHY,
Presiding.

Mr. JUSTICE MEJDA delivered the opinion of the court.

This appeal arises out of nine separate causes consolidated for appeal. The State appeals pursuant to Supreme Court Rule 604(a)(1) (Ill. Rev. Stat. 1973, ch. 110A, par. 604(a)(1)) from an order of the trial court quashing a search warrant and suppressing evidence seized thereunder. The sole issue here is whether the complaint for search warrant was sufficient to establish probable cause for the issuance of the warrant.

Defendants have filed no brief on appeal. Under such circumstances, this court may in its discretion reverse pro forma or consider the appeal on the merits, notwithstanding defendants' lack of participation. (People v. Elliott (1973), 9 Ill.App. 3d 178, 292 N.E. 2d 58; People v. Keeney (1968), 96 Ill.App. 2d 323, 238 N.E. 2d 614.) We choose to decide on the merits.

On October 9, 1973, Walter W. Tinner, a Chicago police officer, appeared before a judge with a complaint for search warrant which contained the following affidavit:

I, WALTER W. TINNER #7312, A CHICAGO POLICE OFFICER, ASSIGNED [sic] TO THE 003RD DISTRICT RECEIVED INFORMATION FROM A RELIABLE INFORMANT THAT NARCOTICS ARE BEING SOLD ON THE PREMISES LOCATED AT 6819 S. RIDGELAND AVE. 1ST FLOOR APARTMENT. THIS INFORMANT HAS RELAYED INFORMATION IN THE PAST THAT RESULTED IN THE ARREST OF 17 PERSONS FOR THE OFFENSE OF "POSSESSION OF NARCOTICS" OF WHICH 7 WERE CONVICTED FOR SAME WITH 2 CASES STILL PENDING IN COURT. SAID INFORMANT IS A KNOWN NARCOTICS ADDICT (HEROIN)



WHICH I, OFFICER WALTER W. TINNER //7317, HAS [sic] HAD OCCASION TO ARREST IN THE PAST, FOR THE OFFENSE OF POSSESSION OF NARCOTICS (HEROIN). INFORMANT STATED THAT ON 7 OCTOBER 1973, AT 10:00 HRS, HE WENT TO THE APT LOCATED AT 6819 S. RIDGELAND AVE, 1ST FLOOR, AND WAS ADMITTED BY A WOMAN BY THE NAME OF "WILSON, LILLIAN, F/N, APPROXIMATELY 40 YEARS OLD, 160 LBS, 5-4" TALL, LIGHT COMPLEXION, WHERE HE OBTAINED A QUANTITY OF HEROIN FROM SAME, (INFORMANT FURTHER STATED THAT HE KNEW THIS TO BE HEROIN, DUE TO THE FACT THAT HE HAS USED SAME IN THE PAST, AND IT WAS A VERY GOOD GRADE) WITH THIS INFORMATION, THE ABOVE REQUESTING OFFICER CONDUCTED A SURVEILLANCE OF PREMISES LOCATED AT 6819 S. RIDGELAND AVE 1ST FLOOR, ON 8 OCTOBER 1973, FROM 1400-1700 HRS, AND OBSERVED SEVERAL KNOWN NARCOTIC ADDICTS ENTER AND DEPART PREMISES AFTER A SHORT TIME IN SAME, AND ON 9 OCTOBER 1973 FROM 0800-1000 HRS WHEREUPON AGAIN SEVERAL KNOWN NARCOTIC ADDICTS WHICH I, OFFICER TINNER HAS [sic] HAD OCCASION TO ARREST FOR THE OFFENSE OF POSSESSION OF NARCOTICS, ENTER AND DEPART PREMISES. BASED ON THE RELIABILITY OF AFOREMENTIONED INFORMANT AND SURVEILLANCE OF PREMISES, I, OFFICER WALTER W. TINNER DO REASONABLY BELIEVE THAT NARCOTICS ARE ON THE PREMISES LOCATED AT 6819 S RIDGELAND AVE 1ST FLOOR APARTMENT, CHICAGO, ILLINOIS, COOK COUNTY.

Based upon this complaint, a warrant was issued for the search of Lillian Wilson and the premises at "6819 S. Ridgeland Ave., 1st floor, Chicago, Illinois," and the seizure of all narcotics and related instruments which constituted evidence of the offense of possession of narcotics. The warrant was executed on October 10, 1973, resulting in the seizure of a quantity of heroin and the arrest of defendants.

Prior to trial defendants moved to quash the search warrant and to suppress all evidence seized. At a hearing on the motion the trial court rejected defendants' argument that the complaint failed to establish the undisclosed informant's reliability. However, the court stated that the complaint did fail to establish that any narcotics remained either on the person of Lillian Wilson or on the specified premises after the informant had "obtained" the heroin; and the affidavit failed to state that affiant had observed known narcotic addicts enter the first floor apartment at 6819 South Ridgeland Avenue, but only that they had entered the 3-flat building. The trial court then entered an order quashing the search warrant as having



been issued without probable cause, and suppressing all evidence seized thereunder.

An affidavit in support of a search warrant need only establish probable cause, not proof beyond a reasonable doubt. (People v. Smolucha (1970), 122 Ill.App. 2d 452, 259 N.E. 2d 319.) To this end, such affidavits are to be read in a practical, realistic and common sense manner. (United States v. Ventresca (1965), 380 U.S. 102; People v. McGrain (1967), 38 Ill. 2d 189, 230 N.E. 2d 699.) As stated in United States v. Harris (1971), 403 U.S. 573, 579, 91 S.Ct. 2075, 29 L.Ed. 2d 723: "A policeman's affidavit 'should not be judged as an entry in an essay contest,' [citation] but, rather, must be judged by the facts it contains." To establish probable cause, an affidavit in support of a search warrant need not reflect the personal observations of the affiant, but may be based upon hearsay information as long as there is a substantial basis for crediting that hearsay. (United States v. Ventresca, supra; People v. Francisco (1970), 44 Ill. 2d 373, 255 N.E. 2d 413.) A substantial basis for crediting such hearsay information exists where the affidavit informs the issuing magistrate of the underlying circumstances from which the informant's conclusion arose, and the underlying circumstances from which the affiant concluded that the informant was reliable. (Aguilar v. Texas (1964), 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723.) We believe that the instant affidavit was sufficient under the Aguilar test to establish probable cause for the issuance of the search warrant.

Here, affiant concluded that based upon the reliability of the informant and the surveillance of the premises, he reasonably believed narcotics were on the specified premises. The trial court found the affidavit to be insufficient, not because of any failure to show that the informant was reliable, but because it did not indicate that any



narcotics remained on the premises after the informant had "obtained" the quantity of narcotics he received. The trial court further found the subsequent surveillance did not corroborate the continued presence of narcotics because the affidavit did not state that known addicts were seen to enter the specified apartment, but only the building itself. Neither finding is justified from the allegation of the affidavit. The trial court placed undue reliance upon the isolated phrase "obtained a quantity of heroin," and overlooked the first sentence of the affidavit which reflects that the informant told affiant that "narcotics are being sold on the premises." It is implicit that there existed an inventory of narcotics from which sales were being made. The finding that affiant's subsequent surveillance of the premises was not corroborative of the continued presence of narcotics on the premises is the apparent result of a misreading of the affidavit by the trial court. Affiant had identified the premises as "6819 S. Ridgeland Ave., 1st floor." The later use of the word "premises" in the same sentence, in the context of observing known addicts enter and leave the premises, clearly was intended to relate back to the identification previously placed upon the word. Any other interpretation would do violence to the principle that the affidavit must be read in a practical, realistic and common sense manner. (People v. McGrain, supra.) Moreover, visits by known addicts on the two days following the date informant allegedly obtained narcotics at the premises is corroborative of the continued presence of narcotics.

The affidavit contains the underlying circumstances supporting informant's reliability and his conclusion that narcotics were on the specified premises. His conclusion is corroborated by the affiant's personal and independent surveillance. The trial court erred in finding that the search warrant issued without probable cause. The order quashing the search warrant and suppressing the evidence seized is reversed and the causes remanded for further proceedings.

Reversed and remanded.

DEMPSY, J., and McNAMARA, J., concur.



No. 57913

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Respondent-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
THOMAS DANIEL BAMBULAS,	)	HONORABLE
	)	RICHARD J. FITZGERALD,
Petitioner-Appellant.	)	PRESIDING.

Before MCGLOON, P.J., McNAMARA and MEJDA, JJ.

PER CURIAM:

Thomas Daniel Bambulas, petitioner, appeals the dismissal of his pro se post-conviction petition filed pursuant to the Illinois Post-Conviction Hearing Act (Ill.Rev. Stat. 1971, ch.38, par.122-1 et seq.) without an evidentiary hearing.

Petitioner was found guilty after a jury trial of the crime of theft and sentenced to a term of five to ten years. Petitioner appealed and on March 27, 1969, the Illinois Supreme Court affirmed petitioner's conviction (People v. Bambulas (1969) 42 Ill.2d 419, 247 N.E.2d 873.) On March 3, 1972, petitioner filed a pro se post-conviction petition alleging that he was denied his constitutional rights in that the clerk of the circuit court of Cook County had refused to deliver him a transcript of his trial. The public defender was appointed to represent petitioner on March 16, 1972. On July 11, 1972, a hearing was held on the State's motion to dismiss petitioner's pro se post-conviction petition. At the hearing, the assistant public defender informed the trial judge that he had written the defendant on four separate occasions. Each time the letter would be returned with a notation that the petitioner refused to accept the correspondence and a letter from the mail office supervisor of the Illinois State Penitentiary stating that petitioner had refused to accept the correspondence and asked that it be returned to the public defender's office. The assistant



public defender stated that since the petitioner refused to cooperate with him in any manner he was unable to ascertain whether there was an existing copy of the transcript of the petitioner's trial. Appointed counsel had also conferred with petitioner's family, and had them present in court on a prior occasion. The State's motion to dismiss was granted by the trial court.

Petitioner's only argument on appeal is that he was denied effective assistance of counsel in the post-conviction proceedings in that his appointed counsel failed to examine the trial transcript as required by Supreme Court Rule 651(c) (Ill.Rev.Stat. 1971, ch.110A, par.651(c)) and People v. Slaughter (1968) 39 Ill.2d 278, 235 N.E.2d 566.

Both Supreme Court Rule 651(c) and People v. Slaughter, supra, require that appointed counsel in post-conviction proceedings consult with petitioner either by mail or in person to ascertain his alleged grievances and examine the report of proceedings at trial. However, it is petitioner's duty to cooperate with his counsel. Where appointed counsel fails to comply with the requirements of the Supreme Court Rule 651(c) and Slaughter based solely upon petitioner's failure to cooperate, petitioner on appeal cannot complain that he was denied adequate representation. In People v. Curtis (1971) 48 Ill.2d 25, 30, 268 N.E.2d 29, 32, the Supreme Court stated the rule:

"Where petitioner refuses, as here, to cooperate with counsel he cannot properly complain of possible inadequacy of representation which is attributable to his own deliberate conduct."

See also People v. Sullivan (1972) 6 Ill.App.3d 814, 286 N.E.2d 605.

In the case at bar, appointed counsel's statements at the hearing on the State's motion to dismiss petitioner's pro se post-conviction petition established that on four separ-



ate occasions he had written to the petitioner. Each of his letters were returned with the notation that petitioner had refused to accept the correspondence and a letter from the supervisor at the mail room at the Illinois State Penitentiary stating that he was returning the letter at the petitioner's request and that petitioner refused to accept them. Petitioner on appeal has not challenged the veracity of these statements. Appointed counsel then stated that he was not aware of whether or not an original trial transcript was in existence because of petitioner's complete failure to cooperate with him. While petitioner now argues that there was "undoubtedly" a copy of the trial transcript in the clerk's office which appointed counsel should have received, this is mere speculation. The record demonstrates that appointed counsel had endeavored to comply with the provisions of Supreme Court Rule 651(c) and People v. Slaughter, supra, but that he was unable to do so based upon the petitioner's refusal to cooperate with him. Under these circumstances, petitioner cannot complain that he was denied adequate representation at the post-conviction proceedings.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.



3D
27 I.A. 536

60140



PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	_____
)	
JOSEPH HILL,	)	HONORABLE
	)	MAURICE W. LEE,
Defendant-Appellant.	)	PRESIDING.

Before Stamos, Leighton and Hayes, JJ.

Per Curiam

Joseph Hill, defendant, was found guilty after a bench trial of the offense of attempt theft (Ill. Rev. Stat. 1973, ch. 38, par. 8-4). He was sentenced to a term of 90 days in the House of Correction. Defendant appeals, arguing (1) that the complaint was fatally defective, (2) that he was not proven guilty beyond a reasonable doubt, and (3) that he did not knowingly and understandingly waive his right to a trial by jury.

At trial, John Walsh, a Chicago police officer, testified that on June 13, 1973, at approximately 1:00 a.m., pursuant to a call, he and his partner, Officer Ronald Kimball, proceeded to a trailer which was parked at 1336 West 79th Street, Chicago, Illinois. As they approached the trailer, Officer Walsh observed the defendant and five or six other young men by the side door. The side door of the trailer had been opened and the seal was lying on the ground. When the men observed the police officers, they fled. There were seven large cardboard boxes from which merchandise had been removed lying by the trailer. Officer Walsh testified that he apprehended the defendant as he was running away from the trailer.

James Wilson testified that he is employed by Acme Trailer, Incorporated, and that he did not at any time authorize the defendant to go



into the trailer parked at 1336 West 79th Street, Chicago, Illinois.

Joseph Hill, defendant, testified that on June 13, 1973, he was walking down the street at 1336 West 79th Street, Chicago, Illinois, when he observed a trailer parked there. Defendant testified that as he approached the trailer, police officers appeared and several young men ran from the vicinity of the trailer; the officers fired at the men and ordered them to halt. Defendant testified that the officers then placed him under arrest. Defendant denied ever attempting to take anything out of the trailer.

Defendant's first contention on appeal is that the complaint was fatally defective in that it did not set forth the nature and elements of the offense charged. He argues that the complaint failed to allege the prerequisite mental state, that defendant intended to deprive the owner permanently of the property, that defendant obtained unauthorized control over the property and that it failed to allege ownership of the property.

In People v. Lonzo, 59 Ill. 2d 115, 319 N. E. 2d 481, the defendant was convicted of attempt theft. On appeal, defendant argued that the complaint charging him with attempt theft was fatally defective in that it did not allege ownership of the property involved. The complaint stated that the defendant had committed the offense of attempt theft in that he, at a stated location on a stated date, "with intent to commit the offense of theft, attempted to exert unauthorized control 'over bicycles in a bicycle storage cage'." The Supreme Court rejected defendant's contention, holding the complaint sufficient. The court noted that the particularity required in a complaint charging a completed offense is not required in a complaint charging an attempt.

In People v. Johnson, ___ Ill. App. 3d ___, ___ N. E. 2d ___ (Nos. 60508, 60509, decided January 14, 1975), the defendant was convicted of attempt theft. On appeal, he argued that the complaint charging him was fatally defective. The complaint alleged that defendant had:

"On or about June 24, 1973, at 1007 Church St. Evanston Illinois committed the offense of Attempt Theft in that he



with intent to commit the offense of Theft attempted to leave Wieboldt's Dept. Store, 1007 Church St. Evanston Illinois with a green sports coat valued at \$25.00."

This court held that the complaint was sufficient to charge defendant with the crime of attempt theft.

In the case at bar, the complaint filed against defendant charged that he:

"[O]n or about 13 June 1973 at 1336 West 79th Street committed the offense of attempt in that he knowingly with intent to commit the offense of theft from trailer attempted to take boxes of material from the trailer after company seal had been removed."

This complaint adequately stated the elements of the offense of attempt theft and was sufficient to charge the defendant with that offense.

Defendant's second contention on appeal is that he was not proven guilty beyond a reasonable doubt because there was no proof that Acme Trailer is a corporation or that they were the owner of the goods in question, or that they were licensed to do business in the State of Illinois. Here, the defendant was observed by Officer Walsh at 1:00 a.m. unloading cartons out of the trailer parked at 1336 West 79th Street, Chicago, Illinois. James Wilson testified he is employed by Acme Trailer, Incorporated, and that he did not at any time give the defendant permission to enter the trailer parked at 1336 West 79th Street, Chicago. This testimony was sufficient to establish that Acme Trailer was a corporation, which had a possessory interest in the trailer in question (Ill. Rev. Stat. 1973, ch. 38, par. 15-2), and that the defendant did not have permission to enter that trailer. See People v. Nelson, 124 Ill. App. 2d 280, 260 N. E. 2d 251; People v. Lewis, 18 Ill. App. 3d 131, 309 N. E. 2d 349. After a complete review of the entire record, we conclude that defendant's guilt was established beyond a reasonable doubt.

Defendant's final contention on appeal is that he did not knowingly and understandingly waive his right to a trial by jury. In People v. Sailor, 43 Ill. 2d 256, 253 N. E. 2d 397, the Supreme Court held that an accused ordinarily speaks through his attorney and by permitting his attorney, in his presence and without objection, to waive the right to a trial by jury, a defendant is deemed to have acquiesced and is bound by his attorney's conduct. The court stated that the trial court is entitled



to rely upon the professional responsibility of defense counsel and that a defendant will not be permitted to complain of an alleged error which he invited by his own behavior and that of his counsel. The rule stated in Sailor is applicable to court-appointed counsel and has been consistently applied by this court. People v. Baez, 20 Ill. App. 3d 896, 314 N. E. 2d 258; People v. Johnson, 18 Ill. App. 3d 854, 310 N. E. 2d 729; People v. Morgan, 18 Ill. App. 3d 153, 309 N. E. 2d 331; People v. Davis, 17 Ill. App. 3d 127, 308 N. E. 2d 34; People v. McClinton, 4 Ill. App. 3d 253, 280 N. E. 2d 795.

In the case at bar, the record reflects that when the defendant's case was called, appointed defense counsel, in defendant's presence, replied: "A plea of not guilty, jury waived." The record demonstrates that defense counsel was prepared for trial and had obviously conferred with his client. At trial, defense counsel cross-examined each of the State's witnesses and presented a defense consisting of the testimony of the defendant. Both at trial and in two written post-trial motions defense counsel argued the insufficiency of the evidence and the complaint. Defendant's conduct in permitting his attorney in his presence and without any objection to waive the right to a trial by jury constitutes a valid jury waiver binding upon defendant.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Abstract only.

3/31/1975
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Bar Assn
27 I.A. 560

74-30

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
 Honorable WILLIAM L. GUILD, Justice
 Honorable ALBERT E. HALLETT, Justice
 LOREN J. STROTZ, Clerk
 WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On April 21, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

2/31/1975
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Bar Assn

3D

FILED

1973

APPELLATE COURT
SECOND DISTRICT

No. 74-30

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,) Appeal from the Circuit
) Court for the Seventeenth
v.) Judicial Circuit,
) Winnebago County,
JOHN D. GULLEY,) Illinois.
)
Defendant-Appellant.)

MR. PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

Defendant John D. Gulley was indicted for the offenses of murder, voluntary manslaughter and involuntary manslaughter. Pursuant to a plea bargain, defendant pleaded guilty to voluntary manslaughter, the indictments charging murder and involuntary manslaughter were dismissed, and defendant was sentenced on July 7, 1972, to 10-20 years in the penitentiary. There was no direct appeal but defendant subsequently sent a letter to the court which was treated and filed as a petition for post-conviction relief and counsel was appointed. Appointed counsel did not file an amended petition. At the conclusion of arguments before the court post-conviction relief was denied on September 14, 1973.

Defendant appeals, contending only that he was denied his constitutional right to the effective assistance of counsel because appointed counsel failed to raise the inadequacy of the

admonishments at the guilty plea hearing pursuant to Supreme Court Rule 402 (Ill.Rev.Stat. 1971, ch. 110A, par. 402) prior to the acceptance of defendant's guilty plea.

Defendant's pro se letter-petition filed in June of 1972 stated in material terms:

"5. That petitioner's conviction resulted from substantial denial of his Constitutional Rights as guaranteed to him under Amendment 14, Sec.1, U.S.C., the circumstances of which will appear in the amended petition in this cause, according to People v. Slaughter, 39 Ill.2d 278, 235 N.E. 2d. 566 (1968)."

In his appearance before the judge the record shows that appointed counsel represented to the court that he was in communication with the defendant; and that defendant thought that the Unified Criminal Code which was enacted subsequent to his sentence would entitle him to a "one-third spread on a Second Class Crime". Counsel represented to the court that he had written defendant advising him that on research he had concluded that if the case had been a direct appeal, the terms of the Unified Code of Corrections providing that the minimum term should not be greater than one-third of the maximum term (Ill.Rev.Stat. 1973, ch. 38, par. 1005-8-1(c)(2)) would have been applicable; but that it was not available to him since the conviction had not been the subject of a direct appeal. Counsel further stated to the court:

"This was a negotiated plea, and there would be no problems as far as the transcript. There is no question as to the Supreme Court Rule on 402, and I think this is the only thing he raised (i.e. the sentence in question), and that is what's bothering him, *** "

The matter was further set for hearing on September 14, 1973. At that time counsel advised the court that he had written to the defendant telling him that pursuant to People v. Neal (1973), 11 Ill.App.3d 403, the provisions of the Unified Code of Corrections

were not applicable to defendant's case and that if the defendant had further questions he should write to counsel. Counsel represented to the court that he had received no communication from the defendant after this letter. The court then denied the petition for post-conviction relief.¹

In appealing only from the September 14th order of denial, the defendant's claim of incompetence of counsel is founded on the premise that appointed counsel should have filed an amendment to the pro se petition. (See People v. Slaughter (1968), 39 Ill.2d 278.) Defendant argues that appointed counsel should have raised the points that defendant was not admonished as to the nature of the charge, his right to plead not guilty or to persist in that plea or his right to plead guilty; that if he pleaded guilty there would be no trial and he would waive his right to a jury trial; that he had a right to be confronted by witnesses against him; and that the court failed to determine that he understood what he was giving up by his plea.

The record, however, does not support defendant's claims that the alleged incompetence of counsel deprived defendant of due process and the effective assistance of counsel. The existence of a substantial denial of petitioner's constitutional rights must be shown to be cognizable under the Post-Conviction Act. (People v. Newberry (1973), 55 Ill.2d 74, 75.) No such substantial denial is shown on this record. Here there was a substantial compliance with

¹ Subsequently on October 9, 1973, defendant filed another pro se petition for post-conviction relief alleging that he was denied due process of law because the public defender who had been appointed in the earlier proceedings was incompetent. The court then appointed new counsel for defendant and set this petition for hearing on November 30, 1973. At that time the court denied the petition on the ground that the defendant had received a previous post-conviction hearing and was not entitled to a second since he could have raised all matters in the earlier hearing. It also appears from the record that the judge was advised that a notice of appeal had been filed from the denial of post-conviction relief in the earlier hearing.

3/31/1975
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Supreme Court rule 402 prior to the acceptance of defendant's guilty plea. The nature of the charge was stated on the record by the State's Attorney in the defendant's presence to be voluntary manslaughter under a negotiated plea. Defendant was advised that he had a right to trial by jury which could pass on his guilt or innocence after hearing whatever defense he wished to put on. Defendant was specifically told that he had the right to have all of the witnesses against him appear in open court in his presence and to testify. And it sufficiently appears from the whole record that the defendant understood what he had been told. Thus the claim under Supreme Court Rule 402 even if formally made in an amended petition could not have resulted in a different conclusion.

The oral statement of counsel that "there is no question as to Supreme Court Rule on 402" indicates that he had considered the matter of admonishments and drew the court's attention to the fact. And in view of the record we would agree with counsel's conclusion that Supreme Court Rule 402 had been substantially complied with and that the claim therefore did not raise an issue of constitutional proportions cognizable in the post-conviction hearing. This was no evidence of incompetency. See People v. Krantz (1974), 58 Ill.2d 187, 193.

Moreover, defendant here does not allege that he did not enter a voluntary plea, does not show in what way he has been harmed or prejudiced and does not claim that the negotiated agreement was not honored. There would be no basis therefore for reversal even if the admonishments under Supreme Court Rule 402 had been in error. See People v. Dudley (1974), 58 Ill.2d 57, 60-61.

For the reasons stated the judgment of the trial court is affirmed.

Affirmed.

GUILD, J. and HALLETT, J. concur.

73-373

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 2nd day of December, in the year of our Lord one thousand nine hundred and seventy-four, within and for the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On April 21, 1975 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

3/31/1975
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Bar Assn

FILED

MAR 21 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

No. 73-373

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court for the Eighteenth
v.	)	Judicial Circuit,
	)	DuPage County, Illinois.
STEPHEN A. MALLORY,)	
)	
Defendant-Appellant.)	

MR. PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

The defendant, Stephen A. Mallory, pleaded guilty to two counts of forgery (Ill.Rev.Stat. 1973, ch. 38, par. 17-3(a)(2)) and was sentenced to 2-6 years in the penitentiary. He appeals, contending that the trial judge improperly admonished him prior to accepting his plea; and also that the judge considered improper and prejudicial evidence at the sentencing hearing.

The defendant's claim that the trial court failed to determine that he understood the nature of the charge against him and failed to determine that there was a factual basis for the plea under Supreme Court Rule 402(a)(1) and (b) (Ill.Rev.Stat. 1973, ch. 110A, pars 402(a)(1), (b)) is not supported by the record.

The record shows that the State's Attorney first recited the facts which the State would introduce at a trial and that the court specifically inquired of defendant whether he understood the

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charges in the indictment and that defendant acknowledged that he had read the charges and did understand them. The court then inquired and received answers from the defendant relative to what each count of the indictment charged.

Defendant's particular claim is that forgery is a complicated crime and that the inquiry did not assure defendant's understanding of the nature of the charge of forgery as applicable to the particular facts of the case. He urges that if the court had gone over the question of the mental state required to constitute the crime that defendant would have considered the fact that he was under the influence of drugs at the time of the offense, as he later claimed in the letter to the probation officer.¹ We agree, however, with the response of the People that defendant's statement to the probation department does not overcome the presumption of the intention to defraud involved in the uttering of a forged instrument (see People v. Bailey (1958), 15 Ill.2d 18, 23-24), since the defendant in his statement recalled the entire incident and said, "We then decided that it would be safe to write a few more and they did and I cashed them." Defendant's later self-serving conclusion that he was under the influence of drugs at the time did not provide a defense under the circumstances. We find that the trial court substantially satisfied the requirements of Supreme Court Rule 402 in informing the defendant of and determining that he understood the nature of the charge against him. People v. Krantz (1974), 58 Ill. 2d 187, 193.

1 Defendant stated "I would like to mention the fact that I was a Heroin addict at the time and I was under the influence of Drugs at the time of the offenses."

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Defendant's argument that the court did not determine the factual basis for the plea is again a reference to the defendant's later statement to the probation officer that he was under the influence of drugs at the time of the offense and is similarly answered by our discussion of his claim as to the nature of the charge. See also People v. Warship (1972), 6 Ill.App.3d 461, 465.

The defendant's final contention is that the court was prejudiced by his examination of hearsay items in the probation report which referred to the fact that defendant lost a job because of dishonesty and was arrested on a number of occasions which did not result in convictions. Defendant acknowledges that the Unified Code of Corrections provides that the trial court shall consider any pre-sentence reports and that the defendant's history of delinquency or criminality "shall be set forth". (Ill.Rev.Stat. 1973, ch. 38, pars. 1005-4-1(a)(1), and (a)(2).) He claims, nevertheless, that the trial court may not consider evidence other than criminal convictions or juvenile dispositions as part of defendant's prior criminal record. (Citing Approved Draft, A.B.A. Standards Relating to Sentencing Alternatives and Procedures, 1968.) We agree with the general proposition. However, from our review of the entire record of actual convictions which was before the court we cannot conclude that the court did consider any evidence other than the previous convictions in determining the sentence. (See People v. Torres (1972), 7 Ill.App.3d 395, 400; People v. Carter (1969), 107 Ill.App.2d 474, 478; People v. Bauer (1969), 111 Ill.App.2d 211, 214.) The record of previous convictions of robbery and burglary and the violation of previous sentences of probation clearly support the sentence of imprisonment which was within the statutory limits, proportioned to the nature of the offense and not a departure from the fundamental law or its

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73-373

spirit. See People v. Buell (1970), 120 Ill.App.2d 367, 372, cf. People v. Beard (1974), 59 Ill.2d 220.

For the reasons stated we affirm the judgment of the trial court.

Affirmed.

GUILD, J. and HALLETT, J. concur.

74-73

27 I.A.^{3D} 568

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 2nd day of December, in the year of our Lord one thousand nine hundred and seventy-four, within and for the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On April 23, 1975 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

3/31/1975
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Abstract

No. 74-73

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FILED

IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT
FIRST DIVISION

MAR 23 1975
LOREN J. STOLTZ, Clerk
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	FOR THE NINE-
	)	TEENTH JUDICIAL
v.	)	CIRCUIT, LAKE
	)	COUNTY, ILLINOIS.
DOUGLAS W. FARLEY and)	
JAMES BURKE,)	
)	
Defendants-Appellants.)	

Mr. JUSTICE HALLETT delivered the opinion of the court:

Pursuant to plea bargain negotiations, defendants each pleaded guilty to one count of kidnapping (Ill. Rev. Stat., 1971, ch. 38, par. 10-1). They each received sentences of imprisonment of not less than three and one-third years nor more than ten years. They appeal from their sentences, contending that the trial court committed reversible error because it considered other criminal charges against defendants (dropped as the result of plea bargain negotiations) not reduced to conviction. We disagree and affirm.

Defendants were each indicted as follows: one count of attempt rape, three counts of kidnapping, and one count of armed violence. The State agreed to nolle prosequi all charges against defendants except one count of kidnapping to which the defendants agreed to plead guilty. At the hearing in aggravation and mitigation, the complaining witness testified to the events which gave rise to the various charges against the defendants. She stated that the defendants had forced her into their car and partially undressed her. One man attempted to have intercourse with her but gave up when

he failed to achieve penetration. The other man fondled her breasts for awhile. Throughout the incident, she feigned illness and finally sufficiently alarmed defendants so that they gave up their sexual advances. Defendants then stopped the car and got out to have a discussion where the complaining witness could not hear them. They returned to the car and threatened her. They could not start the engine. They flagged down an approaching automobile which turned out to be a squad car, which led to defendants' arrest. Defendants admitted that the complaining witness' version of what had occurred was substantially correct.

In pronouncing sentence the trial judge stated:

"The Court also recognizes that if it had not been for the capable manner in which [the complaining witness] handled this entire affair, because of her feigning of an illness, in this court's opinion you two men would be facing today not the charge of kidnapping but it would be the charge of rape because I am convinced from the evidence, the only thing that stopped the rape in this case was the fact that this woman was able to keep her wits about her and finally convinced you two she was suffering from some illness, preventing her from going ahead with the attack."

Defendants admit that the sentences are within the limits for kidnapping but contend that the trial court, in effect, sentenced them for crimes they did not commit (rape). They maintain that the trial court should consider in aggravation only those criminal charges which have resulted in convictions and that it is prejudicial to do otherwise. They rely on People v. Gant (1974), 18 Ill. App. 3d 61, 309 N. E. 2d 265.

Defendants' argument is without merit for the

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following reasons. First, hearings in aggravation and mitigation are not strictly bound by the rules of evidence which pertain at trial (People v. Adkins (1968), 41 Ill. 2d 297, 300, 242 N. E. 2d 258; People v. Williams (1971), 2 Ill. App. 3d 939, 943, 275 N. E. 2d 215). Thus, the court may search anywhere within reasonable bounds for facts which tend to aggravate or mitigate the offense, including a look at other criminal charges against the defendant which were either reduced or dropped as the result of plea bargaining (People v. Fields (1972), 8 Ill. App. 3d 1045, 291 N. E. 2d 258). Here, defendants admitted that the complaining witness' testimony was substantially accurate. That is, they admitted attempting to rape her and there seems to be no question that, given the evidence, the trial judge properly concluded that a rape would likely have occurred but for the complaining witness' quick wits. Certainly, there was a basis for that conclusion.

Second, this case is unlike the case relied upon by the defendants (People v. Gant (1974), 18 Ill. App. 3d 61, 309 N. E. 2d 265). There, defendant was convicted of robbery. He had stolen a purse from the complaining witness following a struggle. The complaining witness died two days after the incident. There was no evidence relating her death to the robbery, yet, the trial court announced that they were related and imposed a heavy sentence. In modifying the sentence, the court stated at page 67, " * * * The defendant was 'clothed in a presumption of innocence' regarding the death of the complaining witness, and it was therefore prejudicial to him when the trial judge imposed a sentence based at least in part on his belief that the defendant was somehow responsible for her

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death* * *". In the instant case, there was evidence that defendants would have committed a rape had it not been for the quick wits of the complaining witness who feigned illness. Therefore, it was proper for the trial court to consider this factor in determining sentence. There was no prejudice to defendants and, therefore, no abuse of discretion by the trial court.

The judgment is affirmed.

AFFIRMED.

SEIDENFELD, P.J., and GUILD, J., concur.

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27 I.A. 579

74-118

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 2nd day of December, in the year of our Lord one thousand nine hundred and seventy-four, within and for the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On April 24, 1975 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

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MAY 17 1975

No. 74-118

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

Abstract

ALFRED R. ZABEL and)	
MARIA M. ZABEL,)	
)	
Plaintiffs-Appellees,	)	Appeal from the Circuit
	)	Court for the Sixteenth
v.	)	Judicial Circuit, Kane
	)	County, Illinois.
ALVIN KORAN,)	
)	
Defendant-Appellant.)	

MR. PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

A judgment for compensatory and punitive damages was entered against defendant when he did not appear for trial after answering a complaint charging breach of a construction contract. A petition to set aside the default filed by defendant within thirty days of the judgment was denied. Defendant appeals.

The complaint was filed on May 16, 1973, seeking \$4,500 in compensatory damages and \$3,000 in punitive damages. On June 14, 1973, defendant appeared by his attorney Richard T. Billik who filed a motion to strike the claim for punitive damages which was denied. An answer to the complaint was thereafter filed by the firm of Redman, Shearer, O'Brien & Blood, Ltd, although it is not clear from the record whether attorney Billik was to continue in the case with the local counsel.

On September 20, 1973 there were certain pre-trial negotiations before the court, resulting in an agreed order. The order provided that a court reporter accompany the parties on an inspection of the premises and submit a report of the agreement of the parties and counsel relative to immediate repair and compromise. Defendant was ordered to undertake repairs in accordance with the report between September 27th and October 9th, 1973 and unresolved matters were to be set for trial on October 11, 1973. Plaintiffs were also given leave to amend the complaint to provide a second cause of action for poor workmanship and to increase the ad damnum to \$10,000 in actual damages and \$5,000 in punitive damages.

On October 11, 1973, defendant did not appear in court. An attorney for the Redman, Shearer, O'Brien & Blood firm did appear and pursuant to notice and motion the firm was permitted to withdraw as defendant's attorney. In the hearing on the motion it was represented to the court that withdrawing counsel "had no cooperation *** whatever" from the defendant and that in addition to sending defendant a copy of the notice and motion to withdraw, the defendant was also called regarding the October 11th court date. It does not appear, however, that such a phone message ever reached the defendant.

After the motion to withdraw was granted, the cause proceeded to trial with the following colloquy between the trial judge and plaintiff's counsel appearing in the record.

"THE COURT: Are you asking for a judgment, Mr. Quetsch?

MR. QUETSCH: Your Honor, first --

THE COURT: I don't have to ask you that. I'll enter an Order on whatever terms you represent, counsel, directing the defendant to comply, or for whatever relief you are asking for.

MR. QUETSCH: I was going to first ask for a rule, but I would ask for a money judgment this morning. This matter was prepared for trial on three occasions and we cooperated fully.

THE COURT: All right, I'll issue the rule, counsel, that Alvin Koran, said defendant, being required to undertake those repairs, in accordance with the agreement, between September 27th and October 9th and to report back to the Court --

MR. BLOOD: There was an Order on that.

THE COURT: Yes. That he certainly has failed to comply with that rule.

MR. QUETSCH: And with reference to the money judgment, we would like to proceed with some proof in support of the judgment here, your Honor, by default in addition to the rule.

THE COURT: What can you prove?"

The court then permitted the proof on the merits in defendant's absence and in addition gave leave to the plaintiff to amend the ad damnum to \$15,000 actual damages and \$3,000 punitive damages. Judgment was entered in those amounts.

On October 12, 1973, attorney Richard Billik filed a petition to vacate the default judgment alleging that in accordance with the court's order of September 20th defendant had agreed to certain repairs and was given the key to the premises to comply; that the plaintiff selected a painter who would do the necessary work for \$1,900 to \$2,100 but that defendant advised plaintiff that the price was too high and that a further attempt would be made to suggest another painter with the work to be held temporarily in abeyance; and that once an appropriately selected painter had finished the work, defendant would do the other agreed repairs.

With regard to counsel's motion to withdraw, it was alleged in the petition that although Mr. O'Brien was aware of defendant's new address in Downers Grove, his notice of motion was sent to an address in Clarendon Hills and accordingly was not received by defendant until October 12, 1973, at which time defendant contacted attorney O'Brien and was first informed that a judgment had been entered against him the previous day. Defendant also alleged that he assumed that O'Brien would represent him on October 11th, and his testimony before the court during the hearing on the petition to vacate substantially supported these allegations. There was no contravening testimony. The trial court denied the petition and this appeal followed.

Defendant argues that the default judgment denied him substantial justice and thus should be vacated. He further argues that even if a judgment by default were properly entered it was error to award punitive damages. Moreover, he argues that the court erroneously applied the difference in value of the property before and after the alleged breach rather than the cost of repairs as the standard of damages.

Plaintiff contends that substantial justice was done and that defendant cannot challenge the sufficiency of the evidence of a trial from which he absented himself. In addition plaintiff argues that the damages were properly assessed.

The discretion of a trial court to set aside a default judgment on a petition filed within thirty days under section 50(5) of the Civil Practice Act (Ill.Rev.Stat. 1971, ch. 110, par. 50(5)) is to be liberally exercised in order to promote justice. (Kearer v. McClelland (1974), 23 Ill.App.3d 1035, 1036-7; Accurate Home Supply, Inc. v. Malpede (1973), 12 Ill.App.3d 749, 754; Knight v. Kenilworth Ins. Co. (1971), 2 Ill.App.3d 493, 495.) There is no longer a requirement that a meritorious defense or due diligence in asserting the defense be shown, but rather these are factors in determining whether the judgment should or should not be vacated in order to do substantial justice. (Village of Mundelein v. Turk (1974), 24 Ill.App.3d 223, 224.) In determining whether justice is being done it is unnecessary for the reviewing court to determine, as a matter of law, that the trial court exceeded or abused its discretion in denying the petition to set aside the default. (Patrick v. Burgess Morton Manufacturing Co. (1975), 324 N.E.2d 196, ___ Ill.App.3d ___; Engelke v. Moutell (1974), 20 Ill.App.3d 253, 256.) The overriding consideration is whether or not substantial justice is being done under the circumstances of the particular case and

whether it is reasonable to compel the other party to try the case on its merits. People ex rel. Reid v. Adkins (1971), 48 Ill.2d 402, 406.

While it is a fair inference from the record that the defendant may well have been uncooperative and that the court was understandably vexed with his reported attitude, it does not fairly appear that defendant wilfully chose to ignore the court proceedings on the date set for trial. His motion to vacate was very timely filed after he learned of the judgment.

Moreover, Section 34 of the Civil Practice Act provides that in case of default if relief beyond that prayed in the pleading to which the party is in default is sought by amendment or otherwise, notice shall be given to the defaulted party. (Ill.Rev.Stat. 1971, ch. 110, par. 34.) It is fundamental that a defendant is entitled to know the precise charge that is laid at his door, the nature and the extent of the relief sought, the property that is or may be affected and an opportunity to be heard. (Klehm v. Klehm (1963), 41 Ill.App.2d 423, 427.) No such opportunity was afforded defendant in the present case. The ad damnum was amended in defendant's absence and without prior notice to him as required under Section 34 of the Civil Practice Act, supra. Even if the defendant had wilfully chosen to ignore the proceedings on the October 11th court date, the judgment in favor of plaintiffs on their complaint as amended could not properly stand. See Klehm v. Klehm, supra.

Under the total circumstances disclosed by this record we must conclude that in order to suitably comply with the intent of Section 34 of the Civil Practice Act as well as to see that substantial justice is done, it is necessary to vacate the default judgment and compel the plaintiffs to try the case on the merits.

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On a retrial the record may be substantially different from that before us on the review of the petition to vacate the default. We therefore will not review the issues raised as to the right to punitive damages and the proper measure of compensatory damages raised by the parties. We presume that the trial court will follow the law applicable to the facts disclosed by the record on retrial.

The judgment below is therefore vacated and the cause remanded to the trial court with directions to proceed in a manner consistent with this opinion.

Judgment vacated and cause remanded.

GUILD, J. and HALLETT, J. concur.

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74-148

UNITED STATES OF AMERICA

27 I.A. 580

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 2nd day of December, in the year of our Lord one thousand nine hundred and seventy-four, within and for the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On April 24, 1975 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

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74-148

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

1971-1972 Clerk
Appellate Court, 2nd District

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)
) Appeal from the 17th
Plaintiff-Appellee,) Judicial circuit,
v.)
) Winnebago County, Illinois.
FRANCIS MAHON,)
)
Defendant-Appellant.)

MR. JUSTICE GUILD delivered the opinion of the court:

Upon a plea of guilty to a charge of delivery of less than 30 grams of cocaine to a special agent of the Illinois Bureau of Investigation defendant was found guilty and sentenced to 3-9 years in the penitentiary. At a later date the judge vacated that sentence and resentenced the defendant to 2-6 years in the penitentiary.

The defendant contends first that the trial court failed to inform him of or determine whether he understood the nature of the charge. The second contention is that at the sentencing hearing the trial court considered improper evidence of an arrest which did not result in a conviction and other evidence of alleged prior bad conduct.

Actually, after a period of contacts with the special agent of the Illinois Bureau of Investigation the defendant did, in fact, sell cocaine to the agent for the sum of \$240. Prior to the acceptance of his plea of guilty the court stated to him, "You understand that you are accused of being a pusher?" The defendant replied, "Yes, sir." In addition to that, prior to the acceptance of the plea, in open court, the State's Attorney stated to the trial judge, in the presence of the defendant and his counsel the facts of the case, specifically "They went up to the apartment where the defendant handed agent Fitzsimmons the cocaine and Fitzsimmons handed Mahon \$240 in U.S. Currency." We find that there was ^{not} only substantial compliance with Supreme Court Rule 402 (Ill.Rev.Stat. 1971, ch. 110A, par. 402) relative to informing the defendant of and determining whether he

understood the nature of the charge against him but there was specific compliance with Supreme Court Rule 402 in this regard. The cases cited by the defendant as to compliance with Supreme Court Rule 402 relative to this issue have been overruled by the Supreme Court. See People v. Krantz (1974), 58 Ill.2d 187, 317 N.E.2d 559.

The next contention of the defendant is that the court considered improper evidence of another crime. At the presentencing hearing the undercover agent testified as to his contacts with the defendant. Specifically he stated that, on April 17, 1973 he purchased five packets of Phencyclidine, apparently known in the drug trade as "PCP" for the sum of \$10. Defendant testified at the presentencing hearing that he did, in fact, sell the five packets to the agent and that Phencyclidine is an animal tranquilizer which, in the words of the defendant, "...isn't good for you. It messes your head up real bad." The sale of the cocaine took place on April 30th. It can thus be seen that the narcotics agent was testifying as to his dealings with the defendant which resulted in the sale of the cocaine. We do not find any error in this regard. It is to be noted the defendant, in response to his own counsel's question, admitted that he had previously sold hashish.

The Supreme Court has set forth the guidelines relative to the information that may be considered by the trial court in a presentencing hearing. In People v. Adkins (1968), 41 Ill.2d 297, 300-01, 242 N.E.2d 258, 260, the court stated:

"In Illinois, too, we have long held that the judge in determining the character and extent of punishment is not limited to considering only information which would be admissible under the adversary circumstances of a trial. While it must exercise care to insure the accuracy of information considered and to shield itself from what might be the prejudicial effect of improper materials (People v. Crews, 38 Ill.2d 331), 'the court is not confined to the evidence showing guilt, for that issue has been settled by the plea. The rules of evidence which ordinarily obtain in a trial where guilt is denied do not bind the court in its inquiry. It may look to the facts of the [crime], and it may search anywhere, within reasonable bounds, for other facts which tend to aggravate or mitigate the offense. In doing so it may inquire into the general moral character of the offender, his mentality, his habits, his social environments, his abnormal or subnormal tendencies, his age, his natural inclination or aversion to commit crime, the stimuli which motivate his conduct..."

We do not feel that the evidence relating to the prior sale of the PCP to the agent leading up to the subsequent sale of the cocaine was improperly considered by the court in imposing sentence, particularly in view of the fact that the court did, in fact, reduce the sentence indicating, in substance, that he was sentencing the defendant solely on the sale of the cocaine. The judgment of the trial court is affirmed.

AFFIRMED.

SEIDENFELD, P.J. and HALLETT, J. CONCUR.

3/31/1975
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27 I.A. ^D 581

73-412

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 2nd day of December, in the year of our Lord one thousand nine hundred and seventy-four, within and for the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:
On April 24, 1975 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

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APR 24 1975

No. 73-412

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

Abstract

ROBERT SUITTS,)	
)	
Plaintiff-Appellant,)	
	)	Appeal from the Circuit
v.	)	Court for the Sixteenth
	)	Judicial Circuit,
CLARENCE MAGEE and	)	DeKalb County, Illinois
VILLAGE OF KINGSTON,)	
)	
Defendants-Appellees.)	

MR. PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

The plaintiff, Robert Suitts, was the write-in candidate for president of the Village Board of Kingston, Illinois, at its municipal election held April 17, 1973. The defendant, Clarence Magee, was the ballot candidate for the office who was found by the judges of election to be the winning candidate. The plaintiff petitioned for a recount, as a result of which the court found that the defendant had received 68 votes, the plaintiff 66 votes, and that 13 ballots in which the name of Robert Suitts had been written-in, but with no "X" marked in the box at the left of the written-in name, were invalid. The court ordered that Clarence Magee be declared the winner and plaintiff appeals.

Plaintiff contends that in a municipal election in which there is no question of identity (he was the incumbent) the intention is clear when the name is written in and the failure to place

an "X" on the ballot does not invalidate the ballot. Plaintiff acknowledges that section 17-11 of the Election Code (Ill.Rev. Stat. 1971, ch. 46, par. 17-11) specifically provides that the voter

"shall prepare his ballot *** by writing in the name of the candidate of his choice in a blank space on said ticket, making a cross (X) opposite thereto *** "

but argues that the provision is not mandatory.

The cases which plaintiff cites in support of this argument (e.g. Gulino v. Cerny (1958); 13 Ill.2d 244; Griffin v. Rausa (1954), 2 Ill.2d 421; Patterson v. Johnston (1927), 328 Ill. 101) involve only the general proposition that if the voter's intention can be clearly ascertained from his ballot, that intention will be effectuated even though the marking of the ballot is not strictly in conformance with law.

None of the cases cited by plaintiff, however, evince approval of the counting of a ballot without an "X" in some form and in some place on the ballot. To the contrary, this case is controlled by our opinion in Stramaglia v. Jenkins (1973), 9 Ill.App.3d 703, and the authorities therein cited, holding that the requirement of an "X" in addition to the written-in name of the candidate is a mandatory provision of the law.

We therefore affirm the judgment of the trial court.

Affirmed.

GUILD, J. and HALLETT, J. concur.

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27 I.A. 634



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IN THE MATTER OF THE APPLICATION OF BERNARD)
KORZEN AS COUNTY TREASURER AND EX-OFFICIO)
COUNTY COLLECTOR OF COOK COUNTY, ILLINOIS,)
FOR JUDGMENT AND ORDER OF SALE AGAINST) APPEAL FROM THE
LANDS AND LOTS UPON WHICH THE TAXES REMAIN) CIRCUIT COURT
DUE AND UNPAID FOR THE YEARS 1971 AND 1972) OF COOK COUNTY.
AND FOR JUDGMENT FIXING THE CORRECT AMOUNT)
OF ANY TAX PAID UNDER PROTEST FOR THE YEARS)
1971 AND 1972,)
)
Applicant-Appellee,)
)
v.) HONORABLE
) ROBERT J. DEMPSEY,
) PRESIDING
JOHN A. HUTTER,)
)
)
Objector-Appellant.)

Mr. JUSTICE EGAN delivered the opinion of the court:

The objector, John A. Hutter, failed to pay real estate taxes assessed against his property for 1971 and 1972; and the County Collector applied for judgment and order of sale of the property to satisfy the delinquent taxes. Hutter filed objections, which the court dismissed on the Collector's motion on the ground that the objector had failed to pay the taxes under protest before filing his objections as required under the Revenue Act. (Ill.Rev.Stat. 1971, ch. 120, §716.) The objector contends that the payment under protest requirement of the statute violates his right to due process under the Federal constitution; he also contends that Article IX, §4(b) of the Illinois constitution of 1970 violates the Federal constitution's guarantee of equal protection of the law in that Article IX, §4(b) permits the classification of real property to the extent that the highest class may be taxed at a rate two and one-half times greater than the lowest. In the trial court, the objector's claims were that he had not received notice of any increase in assessment and that the assessments were excessive and, consequently, constructively fraudulent. He did not raise the two constitutional arguments he raises here, but the Collector has made no point of waiver and neither will we.



The objector has filed a two-page brief in this court citing no cases in support of his argument. The Collector has not called our attention to any case dealing expressly with the constitutionality of this or any similar statute but has cited a line of cases holding that the statute provides an adequate remedy at law and that, therefore, injunctive relief was not available under the factual setting of those particular cases.

The history and purpose of the payment under protest provision of the statute are set out in People ex rel. Sweitzer v. Orrington Co., 360 Ill. 289, 195 N.E. 642. The court noted that confusion had existed over the meaning of "payment of taxes under duress." Some taxpayers, uninformed as to the legality of many of the taxes, paid illegal assessments, but recovery was barred by the confusing legal precedent. In addition, even if illegal taxes were paid under duress, there was still no statutory provision for the taxing authorities to make refunds. Consequently, the court pointed out, during the depression many taxpayers organized tax strikes and filed blanket objections creating a "chaotic condition in revenue collections." Immediate legislation was a necessity, and the amendatory act of 1933 provided that the taxpayer must pay under protest and that the collector must refund the tax if the objection was upheld. The court observed that the purpose of the amendment was to "facilitate the collection of taxes and to protect the taxpayer."

Many cases followed from which the rule evolved that the 1933 amendment provided an adequate remedy at law which the taxpayer must pursue in all cases except where the tax is unauthorized by law or where it is levied upon property exempt from taxation. (Ames v. Schlaeger, 386 Ill. 160, 53 N.E.2d 937; Goodyear Rubber Co. v. Tierney, 411 Ill. 421, 104 N.E.2d 222; Lackey v. Pulaski Drainage Dist., 4 Ill.2d 72, 122 N.E.



2d 257; and Lakefront Realty Corp. v. Lorenz, 19 Ill.2d 415, 167 N.E.2d 236.) The rule was again discussed in Clarendon Associates v. Korzen, 56 Ill.2d 101, 107, 108, 306 N.E.2d 299:

"This rule requires that, other than in cases involving the two exceptions, a special ground for equitable jurisdiction, such as fraudulently excessive assessment, must exist and that an adequate remedy at law must not be available.

* * *

"There will be cases of fraudulently excessive assessments where the remedy at law will not be adequate and injunctive relief should then be available. However, these are not such cases."

The procedural effect of all these cases is that the statute and other traditional remedies provide all taxpayers who have not paid voluntarily with the right to redress any wrong imposed by tax collecting authorities. And, we judge, the statute is not rendered unconstitutional because the taxpayer is required to pay first and litigate later. In Dodge v. Osborn, 240 U.S. 118, 122, 36 S.Ct. 275, 60 L.Ed. 557, the principal issue was whether the taxpayer could restrain the collection of the income tax or whether he must pursue a statutory remedy which required payment of the tax, an appeal to the Commissioner of Internal Revenue and a suit for recovery of the tax if refused by the Commissioner. The Supreme Court held that injunctive relief was not available. A claim that the statutory procedure denied the taxpayer due process was answered quite succinctly:

"There is a contention that the provisions requiring an appeal to the Commissioner of Internal Revenue after payment of the taxes and giving a right to sue in case of his refusal to refund are wanting in due process and therefore there is jurisdiction. But we think it suffices to state that contention to demonstrate its entire want of merit."



And in Phillips v. Commissioner of Internal Revenue, 283 U.S.

589, 595, 599, 51 S.Ct. 608, 75 L.Ed. 1289, it was held:

"The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained.

* * *

"[T]he right of the United States to exact immediate payment and to relegate the taxpayer to a suit for recovery, is paramount."

The objector's other contention that Article IX, §4(b) of the 1970 Illinois constitution violates the equal protection provision of the Federal constitution because it permits classification of property for the purpose of taxation has been answered adversely to the objector in People ex rel. Kutner v. Cullerton, 58 Ill.2d 266, 272-274, 319 N.E.2d 55. For these reasons the order of the circuit court is affirmed.

ORDER AFFIRMED.

GOLDBERG, J. and SIMON, J. concur.



27 I.A. ^{3D} 651

FILED
APR 18 1975

NO. 74-344

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

Walter T. Simmons
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Williamson County
Appellee,)	
)	
v.)	
)	
LOUIS MILES,	)	Honorable William A. Lewis,
	)	Judge Presiding.
Appellant.)	

PER CURIAM

Defendant-appellant Louis Miles was convicted of burglary upon his plea of guilty in Williamson County and was sentenced to serve from three to twelve years. On appeal, this court affirmed the conviction but remanded for a determination of the voluntariness of the plea and for re-sentencing. People v. Miles, 20 Ill.App.3d 131, 312 N.E.2d 648 (1974). On remand, the trial court held hearings in compliance with this court's order, including a sentencing hearing at which defendant was represented by counsel. Defendant was again sentenced to from three to twelve years.

The Office of the State Appellate Defender, appointed counsel for defendant on appeal, filed a motion to withdraw as counsel pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). A copy of the motion and an extensive memorandum filed in support of counsel's position was served on the defendant. This court allowed defendant to file his Brief and Argument on appeal pro se. In his brief, two issues are raised which were not raised in the original appeal. These issues are totally without merit and we need not consider them.

We have reviewed the record carefully and find that the trial court complied fully with the opinion and mandate of this court in People v. Miles, supra. We therefore agree with counsel that the instant appeal lacks merit.

The motion of the Office of the State Appellate Defender to withdraw as counsel on appeal is allowed and the judgment of

the Circuit Court of Williamson County is affirmed.

MOTION ALLOWED; JUDGMENT AFFIRMED.

PUBLISH ABSTRACT ONLY

Jones, P.J. and Moran, J., not participating.



74-155

STATE OF ILLINOIS

People vs. Paul Frederick Lenea, Jr.



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,
on the 1st Day of January in the Year of our Lord one thousand
nine hundred and seventy-five within and for the Third District
of Illinois:

Present— PC

HON. ALLAN L. STOUDEER, Presiding Justice

HON. JAY J. ALLOY, Justice

HON. RICHARD STENGEL, Justice

HON. TOBIAS BARRY, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on
April 25, 1975 the Opinion of the
Court was filed in the Clerk's Office of said Court, in the words
and figures following, viz:

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1975

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of
Plaintiff-Appellee,	)	the Twelfth Judicial Circuit,
	)	Will County, Illinois
v.)	
L. FREDERICK LENE, JR.,	)	Honorable
Defendant-Appellant.	)	Michael A. Orenic
	)	Presiding Judge

CURIAM

Abstract

After a bench trial Defendant, Paul Frederick Lene, Jr., was found guilty of four charges of murder and one charge of aggravated battery. For the murder charges defendant was sentenced to concurrent terms of from 85 to 150 years in the penitentiary and also a concurrent term of from 3 to 10 years in the penitentiary on the aggravated battery charge.

Defendant filed a timely notice of appeal and upon application the State Appellate Defender was appointed to represent defendant on this appeal. The State Appellate Defender moved to withdraw as appointed counsel claiming that after due consideration of the record in this proceeding further appeal would be frivolous and no arguable errors are presented by the record.

From the motion and supporting brief it appears the indictment properly charges the offenses designated and that the court had jurisdiction of the subject matter and the defendant. In open court after appropriate admonishments defendant waived his right to trial by jury.

A motion to suppress evidence including defendant's statements was filed and heard as a part of the bench trial. Allegation was made by defendant in his motion that he was intoxicated either to knowingly and understandably waive his rights to representation or to remain silent or to render statements which he might have made voluntarily. At the hearing the State introduced testimony indicating the defendant was not intoxicated and the defendant himself offered no evidence in support of his motion. Under these circumstances the court's order denying the suppression motion was proper.

The evidence presented by the State was sufficient to show defendant had beaten four persons to death and seriously injured a fifth. Defendant was apprehended at the scene and the evidence was uncontradicted so far as defendant's participation in the events is concerned. Two psychiatrists testified defendant was sane at the time of the offenses.



record amply supports the trial judge's determination of defendant's guilt on all charges.

Defendant waived presentence report and in view of the gravity of the offenses defendant's prior record of three felony convictions no claim can be made that the sentences imposed are excessive.

We agree that no arguable errors are presented by the record and that a further appeal would be wholly frivolous.

For the foregoing reasons the motion of the State Appellate Defender to withdraw counsel is granted and the judgments of the Circuit Court of Will County are affirmed. Judgments affirmed.



7
27 I.A. 986

3D
27 I.A. 833

74-141

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 2nd day of December, in the year of our Lord one thousand nine hundred and seventy-four, within and for the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On April 28, 1975 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



FILED

No. 74-141

APR 28 1975

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

Abstract

ALVIN BLUMEYER,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	THE FIFTEENTH
	)	JUDICIAL CIRCUIT,
v.	)	OGLE COUNTY, ILLINOIS.
)	
TOM MIGHELL CONT.,)	
)	
Defendant-Appellant.)	

Mr. JUSTICE HALLETT delivered the opinion of the court:

A small claim complaint was filed by the plaintiff in the Fifteenth Judicial Circuit, Ogle County, alleging that the defendant was indebted to the plaintiff for the sum of \$1,000 for "Trucking and Labor". When the case was called for trial, the defendant's attorney informed the court that the defendant was enroute to the courtroom. On the basis of the defendant's absence from the court, the trial judge entered a default judgment against the defendant. From this default judgment, the defendant has appealed.

The plaintiff has not filed a brief in the reviewing court. Where, as here, the appellee has filed no brief in the reviewing court, this court may summarily reverse and remand the cause without considering the merits of the case. However, we are not required to summarily reverse on this procedural rule, and we are of the opinion that

* * * [T]he ends of justice are better served if litigation is determined according to the substantive rights of the parties and not by procedural default. (Lynch v. Wolverine Insurance Co. (1970), 126 Ill. App. 2d

192, 193, 261 N. E. 2d 466.)
 See also 2 I.L.P. Appeal and
 Error, ch. 10, §560; Perez
v. Janota (1969), 107 Ill.
 App. 2d 90, 246 N. E. 2d 42;
Daley v. Jack's Tivoli Liquor
Lounge, Inc. (1969), 118 Ill.
 App. 2d 264, 254 N. E. 2d 814;
People v. Giannopoulos (1974),
 20 Ill. App. 3d 338, 314 N. E.
 2d 237; Daley v. Los Laureles
 (1974), 22 Ill. App. 3d 441, 212
 N. E. 2d 159.

Accordingly, we have elected to examine the merits of the case. The issue presented for review is whether it is reversible error to enter, over the objection of the defendant's attorney, a default judgment based upon the defendant's absence from the court, when the complaint was unverified and no sworn testimony was heard by the trial court. After reviewing the record, we find that the trial court erred in entering a default judgment. We therefore reverse the judgment and remand to the trial court for a trial on the merits of the case.

On November 13, 1973, the plaintiff, Alvin Blumeyer, filed a small claim complaint alleging that the defendant was indebted to him for the sum of \$1,000 for "Trucking and Labor". This unverified complaint was filed by the plaintiff pro se.

On December 10, 1973, the defendant appeared in court accompanied by counsel and prepared for trial. At that time, the defendant's attorney entered an appearance as the attorney of record. The plaintiff, appearing pro se at that time, was granted a continuance for the purpose of engaging counsel to represent him. A bench trial was set for December 26, 1973, at 10:00 a.m. During this interval, the plaintiff secured counsel who filed his appearance on December 17, 1973.

Thereafter, the parties received a circuit court assignment sheet informing them that the case had been

74-141

reassigned for a bench trial on February 15, 1974. Subsequently, an additional circuit court assignment sheet was received setting the case for March 6, 1974, at 10:00 a.m. None of these postponements had been requested by the parties.

The plaintiff, the plaintiff's attorney, and the attorney for the defendant were present in court when the case was called. Counsel for the defendant advised the court that his client had contacted him earlier that morning and ^{had} indicated that he was enroute to the courtroom, but would be several minutes ^{late} for the trial. After thirty minutes from the time set for trial had elapsed, the plaintiff's attorney moved for a default judgment. Over the defendant's objection, the trial court granted the motion for default and entered judgment accordingly. Several minutes after this default judgment had been entered, the defendant did arrive in the courtroom.

Subsequently, defense counsel filed a notice of appeal from the default judgment on March 18, 1974. On April 8, 1974, after notice of appeal had been filed, the defendant presented to the trial court a motion and affidavit to vacate the default judgment. Since the filing of a notice of appeal vests jurisdiction with the Appellate court and since no motion to dismiss the appeal was presented by the defendant in accordance with Supreme Court Rule 309 (Ill. Rev. Stat., 1973, ch. 110A, par. 309), the trial court properly denied the motion to vacate the default judgment for want of jurisdiction.

On appeal, the defendant contends that once issue has been joined on the merits of the complaint, it is error to enter a default judgment solely on the basis of the

defendant's absence from the courtroom at the appointed time for trial. Rather, the defendant asserts, the plaintiff must establish his claim by competent evidence. Here, the complaint was unverified and no evidence was presented to the court.

The Small Claims Act (Ill. Rev. Stat., 1973, ch. 110A, par. 281-290, at par. 286) provides:

* * *If the defendant appears, he need not file an answer unless ordered to do so by the court; and when no answer is ordered the allegations of the complaint will be considered denied and any defense may be proved as if it were specifically pleaded.

Thus, no formal responsive pleadings are required in a proceeding under the Small Claims Act in order to join issue. In such a proceeding, an appearance by the defendant is the equivalent of filing an answer denying the allegations of the complaint. In the case at bar, the defendant personally appeared in court and defense counsel entered an appearance on December 10, 1973. Under the provisions of the Small Claims Act, this appearance constituted a denial of the allegations presented in the complaint, and therefore issue was joined. Since the defendant's appearance must be considered a denial of the allegations of the complaint in a small claims proceeding, the plaintiff was required to establish his claim by competent evidence.

It has been stated that

"* * *[W]here there is an answer on file, a default does not exist merely because defendant does not appear at the time the case is called for trial. After issue has been joined, the plaintiff must proceed to prove his case and a

74-141

trial must be had in the same manner as though the defendant had answered on being called." (Koenig v. Nardello (1968), 99 Ill. App. 2d 480, 482, 483, 241 N. E. 2d 567.)

Thus, we hold that the court erred in entering a default judgment based on the defendant's absence from the courtroom where, as here, there had been a denial of the allegations of an unverified complaint by virtue of the defendant's appearance in a small claims proceeding, and where the court heard no evidence tending to establish the plaintiff's claim.

In so ruling, we observe that in Daily Journal v. Smith (1969), 118 Ill. App. 2d 411, 417, 418, 254 N. E. 2d 307, this court stated that

"It seems to us that the overriding reason should be whether or not justice is being done. Justice will not be done if hurried defaults are allowed any more than if continuing delays are permitted. * * * In our judgment, a default should only be condoned when, as a last resort, it is necessary to give the plaintiff his just demand. It should be set aside when it will not cause a hardship upon the plaintiff to go to trial on the merits."

We are unable to discern a resultant hardship upon the plaintiff in requiring him to establish his claim by competent evidence. Accordingly, we reverse the judgment and remand the case for a trial on its merits.

REVERSED AND REMANDED.

SEIDENFELD, P.J., and GUILD, J., concur.



UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice

Honorable WILLIAM L. GUILD, Justice

Honorable ALBERT E. HALLETT, Justice

LOREN J. STROTZ, Clerk

WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On April 28, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:



FILED

No. 73-382

APR 28 1975

IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT
FIRST DIVISION

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

Abstract

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT FOR
Plaintiff-Appellee,	)	THE NINETEENTH
	)	JUDICIAL CIRCUIT,
v.	)	LAKE COUNTY,
	)	ILLINOIS.
JEREMIAH POWELL,)	
)	
Defendant-Appellant.)	

Mr. JUSTICE HALLETT delivered the opinion of the court:

Following a jury trial, defendant was convicted of robbery (Ill. Rev. Stat. 1973, ch. 38, par. 18-1) and sentenced to a term of imprisonment of not less than five nor more than fifteen years. Defendant contends that the trial court based its sentence in large part upon a psychological report made some eight and one half years before and refused to allow the report to be updated, and that, as a result, the sentence is perhaps excessive. We agree and remand with directions.

In fixing the sentence the trial court had before it a psychological report on defendant compiled some eight and one half years prior to the robbery, at a time when defendant had recently been sent to the penitentiary to begin serving a thirty to fifty year sentence for rape. In essence, the report concluded that defendant was an angry, intellectually dull young man prone to outbursts of indulgent, selfish, and anti-social behavior whose sense of morality was based upon a fear of punishment rather than any moral sense of the difference between right and wrong. In laymen's terms, defendant was portrayed by the psychologist as little better than a beast. The report concluded that he needed counseling and close scrutiny. The record

unequivocally shows that the trial court relied heavily on the report in fixing the sentence.

Defendant objected to the report at the sentencing hearing following the trial court's discussion of the report. He maintained that it was out of date, pointing out that subsequent to the report he obtained a reversal of the rape conviction on the ground that certain officers of the court (excluding the trial judge) had misled him into pleading guilty in return for a light sentence which he never got. He contended that, of course, he was angry when the report was conducted; after all, he had just waived his right to trial in return for the "light" sentence of thirty to fifty years. He asked the trial court to conduct a new report so as to update his mental history. The court denied the request, observing that the same machinery which embittered the defendant also corrected the wrong by reversal of the conviction (defendant was then reindicted for rape, pled guilty, was sentenced to from twelve to twenty five years, and was paroled after serving approximately eight years in jail since the 1965 rape conviction). The trial court then imposed sentence, and this appeal followed.

At the outset, we note that defendant does not contend that it was error for the trial court to consider the report, inasmuch as it was part of his mental history which is a factor, among others, comprising the presentence report used in the sentencing hearing (Ill. Rev. Stat. 1973, ch. 38, par. 1005-3-2(a)(1)). Nor does he contend that the report was inaccurate when made. He does maintain, however, that at the time of the hearing below, he was not the embittered young man of eight and one half years/who was faced with the prospect of a loss of thirty to fifty years freedom (perhaps a lifetime)

partly because of a broken promise by an officer of the court. We are of the considered opinion that there was substantial doubt below respecting the relevancy of the eight and one half year old report; enough doubt so as to warrant a psychological re-examination of the defendant upon his request.

The statute (Ill. Rev. Stat. 1973, ch. 38, par.

1005-3-2(b)) provides in part:

"(b) The investigation [comprising the presentence report] shall include a physical and mental examination of the defendant when so ordered by the court. If the court determines that such an examination should be made, it shall issue an order that the defendant submit to examination at such time and place as designated by the court and that such examination be conducted by a physician, psychologist or psychiatrist designated by the court.* * *" (emphasis ours)

The statute is silent respecting what factors, or standard, should be used by the trial court in deciding whether or not to order a mental examination.

The Council Commentary is more helpful (S.H.A., ch. 38, par. 1005-3-2). It states that a mental examination may be ordered by the trial court at a sentencing hearing where such information is deemed pertinent by the court to a program of rehabilitation and control of the defendant. Whether the mental examination is or is not so ordered is a matter of discretion with the trial court. We, of course, cannot reverse in the absence of a clear abuse of that discretion.

We have concluded that the trial court did abuse its discretion. By its own admission, it heavily relied on the report when determining defendant's sentence. The trial court evidently believed that defendant was the same anti-social creature of nearly a decade past. While the trial court was unquestionably in a better position to evaluate the defendant

than we are; nevertheless, it was not as professionally capable psychologically to evaluate the defendant as a trained psychiatrist or psychologist. Still, the court could, as an exercise of discretion, have relied upon its own evaluation. But here, the court chose instead to rely upon a pshychological report, rather than its own evaluation. So long as the court intended to rely upon a psychological report, it was obligated to rely upon a current report; not an eight and one half year old report compiled at a time when defendant was under exceptional stress. We therefore hold that the trial court abused its discretion when it denied defendant's motion for a new updated psychological report.

Consequently, we remand the cause to the trial court for resentencing and direct it to order a new psychological report for defendant before doing so.

SENTENCE VACATED, CAUSE
REMANDED WITH DIRECTIONS.

SEIDENFELD, P.J., and GUILD, J., concur.

27 I.A. ³⁰ 935

74-267

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On April 30, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:



FILED

No. 74-267

MAR 30 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

Abstract

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,) Appeal from the Circuit
) Court of the Fifteenth
v.) Judicial Circuit,
JAMES E. TAYLOR,) Stephenson County,
) Illinois.
)
Defendant-Appellant.)

MR. PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

Defendant, on January 31, 1972, pleaded guilty to an indictment charging him with the offenses of robbery and battery and was admitted to a period of three years probation. On June 7, 1974, defendant's probation was revoked after hearing and he was sentenced to 1-3 years imprisonment. In this appeal defendant claims only that he is entitled to be credited with the time successfully served on probation. We agree.

This case is controlled by our prior decisions, including People v. Fleming (1974), 23 Ill.App.3d 221 and People v. Haak (1975) No. 73-283, ____ Ill.App.3d ____.

Accordingly, the judgment is affirmed and the cause is remanded to the trial court with directions to credit defendant with the time successfully served on probation and to cause its mittimus to issue accordingly.

Affirmed and remanded with directions.

GUILD, J. and HALLETT, J. concur.



74-137 Cons.
74-138 Cases
74-139

27 I.A. 936^{3D}

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 2nd day of December, in the year of our Lord one thousand nine hundred and seventy-four, within and for the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On April 30, 1975 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

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FILED

No. 74-137)
74-138) Consolidated APR 30 1975
74-139)

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court of the Eighteenth
v.	)	Judicial Circuit,
	)	DuPage County, Illinois
DAVID A. BROM,)	
)	
Defendant-Appellant.)	

MR. PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

Defendant entered a negotiated plea of guilty to three separate indictments charging forgery (Ill.Rev.Stat. 1971, ch. 38, par. 17-3(a)(2)), and was sentenced to 2-6 years imprisonment for each offense. The sentences were to run concurrently with each other and with a previous conviction. Two indictments, one charging burglary and the other theft arising from transactions which were unrelated to the forgery charges, were nolle prossed as a part of the plea bargain. Defendant appeals, contending solely that the sentence was excessive.

The forged checks were delivered by the then 22 year old defendant on March 7th, 12th and 14th, 1973. Defendant's prior record consisted of two convictions in the State of Washington in 1972, one for forgery, the other for vagrancy; and a 1972 conviction of forgery and bond jumping in DuPage County. Defendant was sentenced to three years probation on condition that he remain at

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Gateway, a drug rehabilitation center. He left Gateway after six months and upon revocation of his probation on August 27, 1973, he was sentenced to 2-6 years on the original convictions.

It further appears from the pre-sentence report that defendant left high school at the end of his junior year, but received his high school diploma through an army program; attended the College of DuPage for one semester; and while incarcerated in the DuPage County jail enrolled in a three year LaSalle University extension law course. The defendant claimed that the forgeries were done to maintain a heroin habit which he attributed to fear, rejection at home and frustration.

Defendant admits that the sentence is within statutory limits but claims that it is excessive because the trial judge failed to give proper consideration to the facts and circumstances set forth in the pre-sentence report. Defendant also claims that the judge acted arbitrarily in allegedly not reading the report required under the statute. See Ill.Rev.Stat. 1973, ch. 38, par. 1005-3-1.

Defendant's argument that the court failed to consider the report is based on the fact that the judge did not expressly say in the record that he had read it. We find the inference unwarranted. The judge had ordered the report and submitted it as a part of the proceedings. We know of no requirement that the record must contain an express statement by the court that he has read the report.

From our review of the whole record including the pre-sentence report we conclude that the circumstances do not warrant a reduction of sentence pursuant to Supreme Court Rule 615(b)(4). (Ill.Rev. Stat. 1971, ch. 110A, par. 615(b)(4).) We therefore affirm the judgment.

Affirmed.

GUILD, J. and HALLETT, J. concur.



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271.A. 963.

(24540-4M-9-70) 160-0



STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE LELAND SIMKINS, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE GEORGE W. KASSERMAN, JR. Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 1st day
of May A. D. 1975, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:



STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

GENERAL NO. 12471

AGENDA NO. 74-218

ROSE ANN EGGESON, as Executor of the Estate)
of Neal Eggeson, Rose Ann Eggeson, Elsie)
Cooney, Pat Seeland, Joseph Heeger and)
Mary Heeger,)

Plaintiffs-Appellants)

v.)

BROWER MANUFACTURING COMPANY, Mit-Shel)
Company, H. M. Sheer Company, Paul M. Bucklo,)
Bernice Bucklo, T. Fenton Thompson, Margaret)
Thompson, and Carole Brower, as Executor of)
the Estate of Bernard J. Brower, deceased,)

Defendants-Appellees)

CAROLE BROWER, Individually, and as Executor)
of the Estate of Bernard J. Brower, deceased,)

Counter-Plaintiffs-)
Cross-Appellants)

v.)

BROWER MANUFACTURING COMPANY, H. M. Sheer)
Company, Mit-Shel Manufacturing Company,)
Paul M. Bucklo, Bernice Bucklo, T. Fenton)
Thompson and Margaret Thompson,)

Counter-Defendants-)
Cross-Appellees)

APPEAL FROM
CIRCUIT COURT
ADAMS COUNTY
70-CH-10

Mr. PRESIDING JUSTICE SIMKINS delivered the opinion of the court:

This appeal arises out of what began as a minority shareholders'
derivative action to set aside a voting trust agreement and a con-



temporaneous employment contract entered into by the majority shareholders of several essentially family-owned corporations. The case below, which was in the trial court for three years, concluding in favor of defendants, was initially appealed by the plaintiffs who stated they were "most of the minority shareholders." Thereafter, the plaintiffs-appellants filed a petition in this court for leave to dismiss their appeal, and a prehearing conference was held pursuant to Supreme Court Rule 310, following which an agreement was reached by which plaintiffs-appellants would be allowed to dismiss their appeal providing that notice was served upon all minority stockholders who were not parties to the suit and that such dismissal would be without prejudice to Carole Brower's cross-appeal. The subsequent motion to dismiss filed pursuant to the above agreement was allowed by this court on September 10, 1974. Therefore, the issues to be decided here are only those raised by the defendant counter-plaintiff Carole Brower, individually, and as executor of the estate of Bernard J. Brower, deceased. Although this rather complex case was greatly simplified by the dismissal as described above of what were the primary issues at the trial court, the nature of the surviving issues raised by the defendant counter-plaintiff necessitates some knowledge of the corporations involved, the parties, and the transactions giving rise to the entire dispute.

Although three corporations are involved, the facts are the same as to each and they are collectively referred to simply as "the Corporation". Prior to July 1967, B. J. Brower, husband of defendant counter-plaintiff Carole Brower, was president of the



Corporation and held in his name or by voting trust the majority of the stock. The four counter-defendants were related as follows: Margaret Thompson was B. J. Brower's sister, and married to T. Fenton Thompson, who was vice-president of the Corporation at the time of the July 1967 transaction and later became president; Bernice Bucklo, also a sister of B. J. Brower and a member of the board of directors of the Corporation, was married to Paul Bucklo, a vice-president of the Corporation. The transactions in issue were the culmination of B. J. Brower's attempt to transfer control of the Corporation to his sisters, wishing the Corporation to remain in the family, apparently feeling that his brother-in-law Thompson was the most able manager and yet distrusting Thompson due to mutually acknowledged ill will between B. J. Brower and T. Fenton Thompson. A voting trust agreement was prepared and executed by Mr. and Mrs. Bucklo and Mr. and Mrs. Thompson, as well as B. J. Brower. Simultaneously, an employment contract was executed providing payment by the Corporation to B. J. Brower of \$50,000 per year plus five percent of the gross profits before taxes for ten years, or his death, whichever came sooner, for consulting services. The employment agreement was signed by Fenton Thompson and the salary to be paid to B. J. Brower in his retirement was the same as he had received as president of the Corporation. It appears that the voting trust agreement and the employment contract were drafted at the same time to insure B. J. Brower's future employment after he had transferred control of his stock to Thompson and Bucklo by the voting trust agreement. The voting trust agreement transferred sufficient shares to Mrs.



Thompson and Mrs. Bucklo, the voting trustees, to give them voting control. A condition of the voting trust was that if B. J. Brower's salary contract was interfered with, the voting trust would terminate. The voting trust agreement provided that B. J. Brower's shares placed in the trust would be distributed by transferring outright ownership of certain shares to his sisters, Mrs. Thompson and Mrs. Bucklo (just enough shares to give them control of the Corporation), and the remainder of the shares to be purchased by the Corporation.

Out of these facts, this cause arose initially having four parties. The plaintiffs (minority shareholders) brought suit asking that the voting trust and employment contract be set aside on the grounds that the employment contract was unreasonable, that the defendant majority shareholders had breached their fiduciary duty to the plaintiff minority shareholders by the employment agreement-voting trust transaction in that they "purchased" their jobs and control of the Corporation by entering into those agreements, and that the voting trust-employment contract agreement constituted a device for the purchase of Corporation stock with corporate assets. Named as defendants were Carole Brower, both as widow and executrix of B. J. Brower's estate; Mr. and Mrs. Thompson and Mr. and Mrs. Bucklo, and the Corporation. The defendant counter-plaintiff Carole Brower joined with defendants Thompsons, Bucklos, and the Corporation in arguing that the employment contract was made in good faith and that B. J. Brower intended to be available for consultation and public relations but was not utilized by Thompson and Bucklo



due to ill will existing between them; and as to the voting trust, all defendants argued that it did not constitute corporate action, but was a legitimate agreement entered into by shareholders. Carole Brower also filed counterclaims as widow and executrix of B. J. Brower against defendants Thompson and Bucklo, as well as the Corporation, seeking to have herself appointed as successor-voting trustee based on an alleged violation by the Thompsons and Bucklos of a provision in the voting trust agreement; or in the alternative, to declare that as executrix of B. J. Brower's estate, she had an election to refuse to sell stock owned by B. J. Brower to the Corporation.

The first issue is whether defendants Thompson and Bucklo made misrepresentations to the corporate auditor, thereby breaching article VII(d) of the voting trust agreement which provided:

"In the event of the death or incompetency of one of the Voting Trustees, the survivor shall continue as Voting Trustee and at such time shall by instrument in writing, filed with the corporation, designate a successor trustee. This procedure shall be continued upon the death of the remaining primary trustee or upon the death of any successor trustee. * * * The term of the primary trustee or any successor trustee so appointed shall be terminated upon the happening of any of the following conditions:

* * *

"(d) The increase in salaries or fringe benefits to any officers of the corporation, except as in the opinion of the corporation auditors are commensurate with economic conditions. In this respect, no change in corporation auditors shall be made without the joint consent of all parties to this trust, and the opinion of the auditors shall be final.



"Upon the happening of any one or more of the events set forth in sub-paragraphs a), b), c) and d) of this paragraph VII, all provisions for termination of this trust and distribution of stock as provided in paragraph VI shall be automatically null and void, and the following provisions shall come into effect in lieu thereof:

i) This trust may be terminated only upon expiration of the term of the trust or by agreement of all parties;

ii) Upon termination of the trust, all stock held by the trust shall be distributed to registered holders of voting trust certificates.

"And in addition, Bernard J. Brower shall become successor voting trustee, and he shall by instrument in writing filed with the Company, appoint a successor voting trustee. Upon his inability to act as successor voting trustee, Carol [sic] Brower shall act as successor voting trustee, and she shall by instrument in writing filed with the Company, appoint a successor voting trustee. The procedure of appointing successor voting trustees shall continue so long as this trust is in effect. Nothing herein shall be retroactive to any employment contract where changes have heretofore been made and accepted."

Paragraph V provided that the voting trust agreement should

remain in effect for ten years unless sooner terminated by other provisions in the agreement. Paragraph VI, which was referred to in VII quoted above as providing for termination of the trust and distribution of the stock, provided that:

"This voting trust agreement shall be terminated on the happening of any of the following conditions:

- a) Expiration of the term of the trust;
- b) The joint consent of all parties, if prior to the date of the expiration of the term of the trust;
- c) The death of Bernard J. Brower, if prior to the date of the expiration of the term of the trust."



Paragraph VI went on to state that upon termination the trustees should deliver stock to the registered holders of the voting trust certificates except for the stock of B. J. Brower, the distribution of which was then specified and which gives rise to the second issue presented by the defendant cross-plaintiff Carole Brower on this appeal. Paragraph VI provided that B. J. Brower's stock should be distributed as follows:

- "a) To Margaret Thompson, 358-1/2 shares;
- b) To Bernice Bucklo, 358-1/2 shares;
- c) The remaining 880 shares, if the trust is terminated by the death of Bernard J. Brower, shall be sold to Brower Manufacturing Co. at \$123.00 per share, pursuant to the minutes of the meeting of Brower Manufacturing Co. held September 22, 1953, and be purchased with the proceeds of life insurance on the life of Bernard J. Brower, owned by Brower Manufacturing Co., which proceeds shall be paid into the estate of Bernard J. Brower. If the trust is terminated by any reason other than the death of Bernard J. Brower, * * * " [that portion of his

stock was to be put in a trust subject to specified conditions.]

Mrs. Brower's first issue is whether paragraph VII(d) was breached by defendants Thompson and Bucklo in October 1967 by the purchase of company cars for themselves and in May or June 1968 by giving themselves substantial pay raises, thereby terminating the term of the primary trustees which was to result in Bernard J. Brower becoming successor voting trustee, or if he was unable, his wife, defendant counter-plaintiff Carole Brower, in his place. The counterclaim prayed that the voting trust agreement be terminated and the parties placed in the position they would have been had the



trust been terminated in October 1967, or in the alternative as of May 1968; that T. Fenton Thompson, Paul M. Bucklo, and their agent William Green be ordered to repay salary improperly received by them; that Margaret Thompson and Bernice Bucklo, individually, be required to transfer 358-1/2 shares of stock to Carole Brower as executrix of B. J. Brower's estate; that the company be required to transfer 880 shares of stock to Carole Brower as executrix of B. J. Brower's estate, and that the court make other such orders and decrees as equity required. Counter-plaintiff's first contention is premised on the proposition that any increase in benefits or salary which were not approved by the corporation's auditor as being justified by economic additions automatically terminated the trust and passed control back to B. J. Brower and his representatives. Thompson and Bucklo assumed the control of the Corporation in August 1967, and in October 1967 sent William Green, a long-time Corporation employee, to the corporate auditor Walter Diggs in St. Louis to seek his approval to buy company cars for Thompson and Bucklo. The essence of counter-plaintiff's theory is that this approval was sought and obtained by representing to the auditor that his advice and approval was only being sought from an income tax standpoint without disclosing to him the voting trust restrictions or his (the auditor's) role as policymaker as stated in the voting trust agreement. In May 1968, Green again went to St. Louis to procure approval from Walter Diggs of substantial pay raises for Thompson, Bucklo and himself, all of which were granted in June 1968 with different larger amounts than the figure shown to Diggs in St. Louis. Green



denied the May 1968 trip to St. Louis, but both Diggs and his associate testified that Green did visit them at that time. Diggs testified that he thought the meeting in May 1968 was merely to get his approval from a tax angle and that he was never fully informed of the voting trust agreement. Diggs testified that in June 1968 he came to Quincy and met with Thompson, Bucklo and Green. Thompson testified that he showed Diggs the voting trust agreement and pointed out that it required Diggs' approval prior to salary increases for corporate officers. Diggs denied that he was shown the agreement by Thompson at that time. There is much confusing testimony about attempts to influence recommendations written on Diggs' stationery, the use of different typewriters in making changes in the amounts of the raises for the officers and a letter allegedly written by Thompson or Green purportedly from Diggs to the effect that he was exercising his judgment under Article VII(d) of the voting trust agreement. B. J. Brower finally sent Diggs a copy of the voting trust agreement in August 1968 and for the first time, according to Diggs, he understood his intended role as arbiter and policymaker. On September 6, 1968, Diggs wrote to the Corporation saying that at no time had he given approval for the company cars and that he had thought he was only being asked for tax advice. Additionally, as to the salary raises discussed in the spring of 1968, Diggs told B. J. Brower that his approval was only given as to the tax deduction validity under the Corporation's economic conditions.

There is a great deal of confusing argument as to this alleged violation of the voting trust agreement, but in essence, the



counter-plaintiff's arguments are (1) that the voting trust agreement was not presented in its entirety, if at all, to Walter Diggs in order to obtain company cars and increased salaries; (2) Green told Diggs that B. J. Brower knew about the cars and salary increases when he did not; (3) Green told Diggs that the auditor's advice and approval from an income tax standpoint was what was being sought; and (4) Thompson, through the draft of a letter, added an extra \$4000 to his own salary raise beyond that which Diggs purportedly approved in May 1968. Therefore, counter-plaintiff Carole Brower prayed that she be appointed successor voting trustee under the voting trust agreement for the violations by Thompson and Bucklo. The counter-defendant argued that the voting trust agreement was drafted by B. J. Brower with his associate William Green and his attorney, with defendants Thompson and Bucklo knowing nothing of the provisions until they were signed in July 1967. As to the purchase of the automobiles, Thompson and Bucklo point out the letter from the auditor Diggs approving that purchase in October 1967, and the testimony of Green that he discussed the matter with B. J. Brower's attorney who in turn discussed it with Brower, who chose to do nothing. As to the salary increases, the counter-defendants contend that Green showed Diggs sub-paragraph VII(d) of the voting trust agreement at the time they first discussed the approval of salary increases, and that Diggs thereafter wrote three letters in which the salary raises were involved. After the last letter from the auditor purportedly approving the salary increases, such contracts were made and approved by the board of directors in July 1968.



Thereafter, when B. J. Brower learned of these salary increases, he went to St. Louis, berated Diggs for approving the salary increases, and hired an attorney in St. Louis who drafted the letter for Diggs to sign in which Diggs recants on both his October 1967 letter pertaining to the purchase of the automobiles and the June 1968 letter pertaining to salary raises.

There appears to be no question of law on this issue, but rather simply a determination of whether Diggs' testimony should be believed rather than Green's. Credibility is a matter for the trial court, which in this case was very familiar with the circumstances of this cause litigated over a three-year period. The auditor Diggs gave approval of both the purchase of the automobile and the salary increases in writing, making reference to the financial standing of the company and making no reference to income tax consideration. The automobiles were authorized and purchased in October 1967 and even the counter-plaintiff acknowledges that B. J. Brower found out about it shortly thereafter, and although displeased, took no action. As to the salary increases, Diggs paraphrased paragraph VII(d) of the voting trust agreement in recommending specific salary increases, and the letter of recantation of September 1968 is completely contrary to his earlier letters and the circumstances established by testimony of both sides, and was apparently prompted by extreme pressure brought upon him by B. J. Brower, who was greatly angered by the salary increases. However displeased B. J. Brower may have been, there is no evidence that he took any action within the Corporation or in the courts



to attack the salary increases for Thompson, Bucklo and Green, or that he made any effort to declare the salary increases a breach of the voting trust agreement as would terminate the agreement or make himself voting stock trustee by ending the term of the primary trustees. The trial judge heard all of these parties testify and apparently believed the testimony of Green and the written evidence indicating proper approval of the automobile purchase and salary raises, rather than Diggs' inconsistent testimony. The trial court concluded that the approval by Diggs of the fringe benefits and salary increases was given as required by the voting trust agreement's guideline of "commensurate with economic conditions" and were not ineffective merely because he may not have had full knowledge of the voting trust agreement's terms.

As an alternative to the theory that the voting trust agreement was terminated by defendants' breach of its terms, counter-plaintiff contends that as executrix of B. J. Brower's estate, she has the election to refuse to sell those shares of stock owned by B. J. Brower in the voting trust at the time of his death. The voting trust agreement (again referring only to the agreement pertaining to one of the corporations) provided that it would terminate upon (a) the expiration of the trust term; (b) the joint consent of all parties, if prior to expiration of the term; (c) the death of B. J. Brower, if prior to the expiration of the term. The agreement went on to provide that upon termination the voting trustee should deliver the stock to the registered holders of voting trust certificates, except for that of B. J. Brower, which should



go as follows: 358-1/2 shares each to Margaret Thompson and Bernice Bucklo, and if the trust was terminated by the death of B. J. Brower, his remaining 880 shares should be sold to the Corporation at \$123 per share pursuant to the minutes of the September 22, 1953, meeting, and purchased with the proceeds of life insurance held by the Corporation on the life of B. J. Brower. Therefore, counter-plaintiff contends that even though the voting trust sets the price at \$123 per share and states that this stock shall be sold, it refers to the agreement of 1953, citing Martindell v. Lake Shore Nat. Bank, 15 Ill.2d 272, 154 N.E.2d 683, for the general proposition that a contract is to be construed as a whole giving meaning and effect to every provision and word if possible, since it is presumed that everything in the contract was inserted deliberately and for a purpose. From that, counter-plaintiff reasons that the reference in the voting trust agreement to the Corporation minutes of September 1953 must have had a purpose and counters the most obvious reason--which would be the 1953 resolution's provision for the Corporation to purchase life insurance on the officers for the purpose of buying their shares at death--by pointing out that the voting trust agreement also specifically states that shares of stock are to be purchased with the proceeds of life insurance on B. J. Brower owned by the Corporation. The counter-defendants, on the other hand, point out the unequivocal language of the voting trust that the 880 shares "shall be sold" and then refer to the overall intent of the voting trust to insure a substantial income



to B. J. Brower and his wife and liquidity to his estate, but to assure that control of the Corporation pass to B. J. Brower's two sisters rather than being spread among B. J. Brower's widow and nieces and nephews. The trial court found that by the voting trust agreement, B. J. Brower had bound his estate to its terms and that he had removed all discretion from the estate relative to those shares of stock placed in the voting trust.

The weight of the evidence is clearly on the side of the counter-defendants on this issue. The resolution of September 22, 1953, provided that the Corporation would purchase life insurance on its officers, the proceeds of which were to be used to purchase stock owned by a deceased officer so that sales of stock would not have to be made to outsiders, with the price to be not more than the book value of their most recent audit, and the estate having the right not to sell all or any shares in which event the proceeds from the life insurance policy should be put into the general funds of the company. On the other hand, the voting trust agreement of 1967 provided that a precise number of shares owned by B. J. Brower, in the event the trust was terminated by his death, "shall be sold" at a specified price per share. The entire thrust of the voting trust agreement was to pass control of the Corporation to the Thompsons and Bucklos (and in fact the disposition pursuant to the agreement gave them exactly one share more than 50 percent) while at the same time assuring B. J. Brower a substantial income during his life and his estate a substantial sum of money upon his



death. That purpose would be defeated by the construction giving B. J. Brower's estate an option whether or not to sell that stock as is sought by the counter-plaintiff.

Therefore, we affirm for the counter-defendants on both issues. For the sake of brevity this opinion has referred simply to the voting trust agreement, the disposition of various numbers of shares, and price per share pertaining to only the Brower Manufacturing Company. The stock involved in counter-plaintiff's issue on her alleged option not to sell a portion of B. J. Brower's stock held in the voting trust is 880 shares in Brower Manufacturing Company with a value of \$108,240 at the specified price; 260 shares of H. M. Sheer Company stock valued at \$20,800 at its specified price; and 65 shares of Mit-Shel Company in the amount of \$20,995 at its specified price, for the total of \$150,035 which was tendered to the estate by the counter-defendants and returned by the counter-plaintiff contending that she had an option to refuse to sell those shares. That sum of money [\$150,035] is due counter-plaintiff for those shares of stock in the three corporations which were redeemed by the Corporation pursuant to the voting trust agreements.

JUDGMENT AFFIRMED.

TRAPP, J., and KASSERMAN, J. concur.





NO. 60554

SHEILA COCKRELL, a minor, by JAMES	)	APPEAL FROM
COCKRELL, her father and next friend,	)	CIRCUIT COURT
	)	COOK COUNTY.
Plaintiff-Appellee,)	
)	
vs.)	
)	
ELKNER SMITH,	)	HONORABLE
	)	NICHOLAS J. BUA,
Defendant-Appellant.	)	PRESIDING.

BEFORE DOWNING, P.J., LEIGHTON and STAMOS, JJ.

Per Curiam

Defendant appeals from an order of the circuit court of Cook County vacating an order dismissing plaintiff's suit for personal injuries.

On October 11, 1967, plaintiff, a minor through her father and next friend, filed a suit against the defendant seeking damages for personal injuries received when defendant's car struck plaintiff. Thereafter, defendant filed an answer denying each of plaintiff's allegations. On October 7, 1968, defendant filed interrogatories which were duly served upon plaintiff. On September 23, 1970 and November 4, 1970, the trial court entered an order requiring plaintiff to answer defendant's interrogatories. On December 8, 1970, the trial court granted defendant's motion to dismiss plaintiff's suit for failure of plaintiff to comply with the order to answer interrogatories. A notice and copy of the motion was duly served upon plaintiff. On March 29, 1974, plaintiff moved the court to vacate the dismissal of December 18, 1970, alleging that neither she nor her attorney were served with a copy of the order entered December 18, 1970, as required by Rule 7.2 of the circuit court of Cook County. The motion was not made under oath nor was it supported by affidavit. The trial court granted plaintiff's motion and allowed her to file answers to the defendant's interrogatories and instanter. Defendant appeals the trial court's order vacating the order of dismissal.



The first issue presented on appeal is whether the order of dismissal entered by the circuit court of Cook County was a void judgment. It is well settled that a void judgment may be set aside at any time. (Reynolds v. Burns, 20 Ill. 2d 179, 170 N. E. 2d 122.) The Illinois Supreme Court in Baker v. Brown, 372 Ill. 336, 23 N. E. 2d 710, set forth the rule:

"The general rule is, a judgment rendered by a court having jurisdiction of the parties and the subject matter, * * * is not open to contradiction or impeachment in any collateral action or proceeding except for fraud in its procurement, * * *."

In Johnson v. Hawkins, 4 Ill. App. 3d 29, 280 N. E. 2d 291, plaintiff's law suit was dismissed for plaintiff's failure to answer defendant's interrogatories. Subsequently, plaintiff moved to vacate the dismissal order claiming that it was void. The motion was denied and plaintiff appealed arguing that the order of dismissal was void in that the failure to give notice of various motions and court orders constituted fraud. The trial court rejected defendant's contention holding:

"The fraud alleged here did not create a void order. The court did have jurisdiction over the parties and the subject matter and the purported fraud was one of failing to send notices. Such failure does not render the decree void but merely voidable."

See also, Brown-Strauss Corp. v. Larson, 22 Ill. App. 3d 905, 317 N. E. 2d 303.

In the case at bar, the trial court at the time it entered the dismissal order on December 18, 1970, had jurisdiction over the parties and subject matter and there is no claim that fraud was used in the procurement of the order. Plaintiff was given notice and was served with a copy of the motion to dismiss. Under these circumstances, we conclude that the order of dismissal was not void.

The only remaining question is whether plaintiff's petition was sufficient to justify relief under section 72 of the Civil Practice Act (Ill. Rev. Stat. 1973, ch. 110, par. 72). Section 72 of the Civil Practice Act was created to furnish a comprehensive procedure in all equity, law and statutory proceedings whereby a party may seek relief from final judgment after 30 days from the entry thereof and after the time for appeal has expired. (Fisher v. Rhodes, 22 Ill. App. 3d 978, 317 N. E. 2d 604.) A



petition filed under this section is an original action and not a continuation of a previous action. To be entitled to relief, a petitioner must make a showing by affidavit or other appropriate method of matters not contained in the record, that through no fault or negligence of his own there is an error of fact the existence of which presents a valid defense which was not made to appear in the trial court. Brunswick v. Mandel, 59 Ill. 2d 502, 322 N. E. 2d 25.

Plaintiff now argues that she was a minor who could not maintain the action herself but only through her next friend and, therefore, the negligence of others in the handling of her action cannot be imputed to her. The legislature, in enacting section 72, specifically provided for a two year statute of limitations. The Act goes on to provide that a person who is under a legal disability, such as infancy, is not bound by the two year statute of limitations during the period of which the disability exists. However, the legislature did not see fit to provide that minors who present an action through a next friend are exempt from the other provisions of this section.

In the case at bar, plaintiff, a minor, prosecuted an action through her father and next friend. Plaintiff was at all times represented by counsel. The record affirmatively shows that counsel was mailed notice and a copy of defendant's motion to dismiss for failure to answer interrogatories which was subsequently granted by the trial court. For over three years nothing was done. Thereafter, plaintiff filed a motion to vacate alleging as the only grounds for relief that neither plaintiff nor plaintiff's attorney were served with a copy of the order of dismissal as required by Circuit Court Rule 7.2. Plaintiff in that petition did not allege that she or her counsel were unaware of the dismissal nor did her counsel deny that he was served with notice and a copy of the motion prior to the entry of the order. The motion to vacate the dismissal filed by plaintiff was not supported by affidavit or other appropriate showing of facts not appearing in record, was not served personally or by registered mail as required by section 72 of the Civil Practice Act and Supreme Court Rule 106, and did not in any manner allege due diligence on the part of plaintiff or a meritorious defense. Under these circumstances, we conclude that plaintiff's petition was totally insufficient on its face to justify



the granting of relief under section 72 of the Civil Practice Act.

Accordingly, the order of the circuit court of Cook County granting plaintiff's petition to vacate the order dismissing the suit is reversed.

Order reversed.

Abstract only.





NO. 60488

THOMAS J. SCANLON, MARGARET M. SCANLON,	)	APPEAL FROM
JAMES HUGHES and NOREEN HUGHES,	)	CIRCUIT COURT
	)	COOK COUNTY.
Plaintiffs-Appellees,)	
)	
vs.)	
)	
E. KARL FAITZ, Building Commissioner, and)	
VILLAGE OF OAK LAWN, a Municipal Corporation.	)	HONORABLE
	)	ARTHUR L. DUNNE,
Defendants-Appellants.	)	PRESIDING.

BEFORE DOWNING, P.J., LEIGHTON and HAYES, JJ.

Per Curiam

Petitioners (hereinafter designated as plaintiffs) filed a petition for writ of mandamus praying that the trial court rescind the stop-order issued by respondents (hereinafter designated as defendants) which revoked the building permits for the erection of two one-family residences on the property commonly known as 5301-07 West 89th Street, Oak Lawn, Illinois. The court issued a writ of mandamus commanding the Village of Oak Lawn to allow plaintiffs to proceed to construct their buildings on the property and defendants appealed.

The issues on appeal are whether the trial court erred in ordering the writ of mandamus to issue without an evidentiary hearing on the merits and whether the agreed facts were sufficient to estop the Village of Oak Lawn from revoking the previously issued building permits.

In the mandamus petition plaintiffs alleged that they own the property commonly known as 5301-07 West 89th Street, Oak Lawn, Illinois; that on June 15, 1971, the Board of Trustees of the Village of Oak Lawn granted a zoning variation "allowing construction of two buildings on the above described real estate"; that on July 24, 1973, building permits were issued by defendants for the erection of two one-family residences on said property; that plaintiffs, "in reliance on the aforesaid building permits, have incurred expenses for architect's services, have excavated the said premises, have ordered building materials for the proposed buildings and have



incurred other expenses all in excess of the sum of \$22,000, until prevented from proceeding further by defendants on August 14, 1973"; and that "defendants' action in issuing said stop-order was asserted by defendants to be based on the fact that defendants insisted on the passage of a new variation ordinance after the building permits were issued." Plaintiffs further alleged that "defendants' action is arbitrary, capricious, illegal and void"; that it is not based on any violation by plaintiffs of any ordinance of the Village of Oak Lawn; that defendants should be estopped from vitiating the permit; and that plaintiffs have made demands on defendants to rescind said stop-order, but defendants have refused and persist in refusing to rescind said order.

Defendants filed an amended answer in which they denied that a zoning variation was granted by the Board of Trustees of the Village of Oak Lawn on June 15, 1971, for the reason that an ordinance granting such variation was not passed as required by Section 11-13-5 of the Municipal Code; and that the power to approve variations is reserved by the corporate authorities of the Village of Oak Lawn. Defendants admitted that building permits were issued to plaintiffs "but allege that they were issued through clerical error and that the Village of Oak Lawn stopped construction as soon as said error was discovered." Defendant denied that their actions were arbitrary, capricious, illegal and void for the reason that they followed the statutes of the State of Illinois and that plaintiffs knew or should have known the requirements thereof. Defendants further denied that plaintiffs were being deprived of the use of their property because a house can be constructed thereon. The original answer does not appear in the record.

The cause came on for hearing on December 4, 1973, at which time counsel for plaintiffs asked "counsel for the defendant to state whether any of the facts contained in the petition are in dispute." Counsel for defendants stated that the matters in the complaint are denied and he cannot admit them; and that he could not admit "as to the ownership of the property."

At the suggestion of the trial court, the cause was continued to January 21, 1974, for the parties to submit memoranda of law.



Plaintiffs, in their Memorandum of Law, stated the facts as follows:

"It is stipulated that the owners and builders requested the variation in June, 1971. The request was in excess of the Board of Appeals jurisdiction; as a result, it was heard before the Board of Trustees who granted the variation on June 15, 1971, for the construction of two buildings on the premises. The said action of the Board of Trustees in accordance with the then practice of said Board was not ratified by ordinance. In reliance thereon, the Petitioners bought the real estate in accordance with contract providing for such use of the land.

"On July 24, 1973, building permits were duly issued by the Village of Oak Lawn for the erection of the two one-family residences. Said permits were paid for by Petitioners to the Village. Immediately thereafter, the Petitioners incurred architects' fees, excavated the two parcels of land and ordered and obtained building materials.

"That on August 14, 1973, the Village issued a verbal stop-order directing the Petitioners to stop proceeding, to fence the premises and restore the premises. The Village has refused to pass a new variation ordinance, even though the building permits were issued."

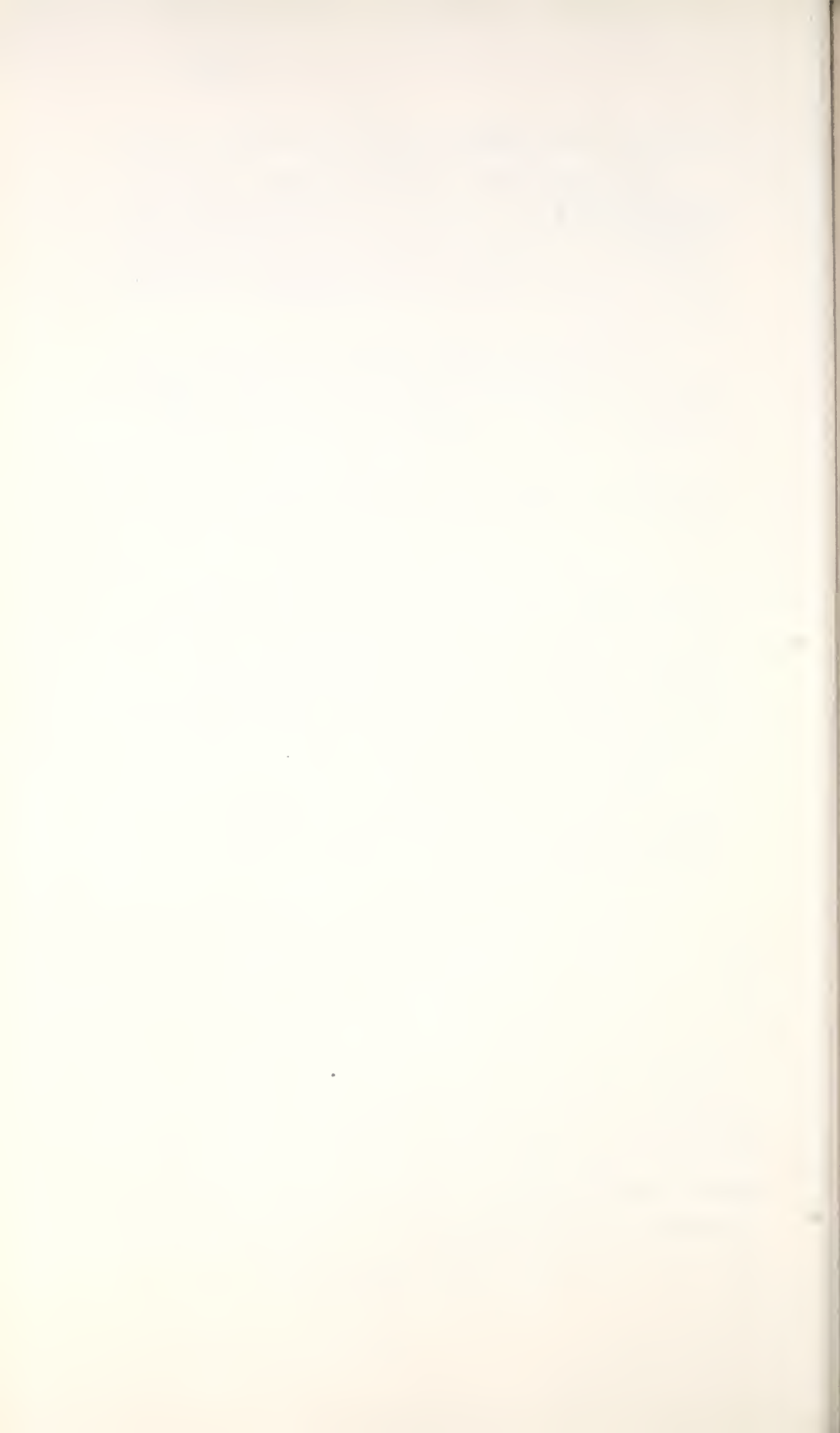
Defendants, in their Memorandum of Law, stated the facts as follows:

"In June of 1971 the owners of the property in question obtained the approval by the Board of Trustees of the Village Lawn [sic] of their request for a variation to build two homes on three thirty-foot lots. No ordinance was authorized to be prepared or passed. Approximately two years later the petitioners purchased the property and applied for building permits which were issued by an employee of the Building Department. Upon learning that the petitioners were beginning excavation on the property, the building permits were withdrawn. The petitioners were directed to re-apply for the variation because of the lapse of time, which they refused to do.

"Other than disagreeing with certain legal conclusions made by the petitioners in stating the facts, defendants agree to them as stated. The respondents specifically denies that the petitioners or the prior owners ever requested that an ordinance be passed by the Board of Trustees of the Village of Oak Lawn effecting the variation in question."

At the hearing on January 21, 1974, the trial court, after hearing argument of counsel, said that based on the briefs and statement of facts, plaintiffs were induced by the conduct of the Village officers and suffered substantial loss and, therefore, ordered the authorities of Oak Lawn to issue the building permits.

Defendants argue that plaintiffs have failed to prove a clear legal right to a writ of mandamus (People ex rel. American Nat. Bk. v. Smith, 110 Ill. App. 2d 354, 249 N. E. 2d 232) and that the Village is not estopped from revoking an erroneously issued building permit. (Ganley v. City of Chicago, 18 Ill. App. 3d 248, 309 N. E. 2d 653; City v. Zellers, 64 Ill. App. 2d 24, 212 N. E. 2d 737; Johnson v. City of Chicago, 107 Ill. App.



2d 182, 246 N. E. 2d 115.) Plaintiffs argue that where a party acting in good faith, under affirmative acts of a village, has made expensive and permanent improvements, it would be highly inequitable and unjust to destroy the rights acquired, and the doctrine of estoppel should be applied. American Nat. B. & T. Co. v. City of Chicago, 19 Ill. App. 3d 30, 311 N. E. 2d 325; Fifteen Fifty State St. v. Chicago, 15 Ill. 2d 408, 155 N. E. 2d 97.

Where the method provided by statute for the exercise of a power is by ordinance, this power must be exercised by ordinance and a resolution is not sufficient. I.L.P., Cities, Villages, and Other Municipal Corporations, Vol. 8, ch. 5, sec. 122, p. 420; Village of Gulfport v. Buettner, 114 Ill. App. 2d 1, 251 N. E. 2d 905.

Section 11-13-5 of the Illinois Municipal Code (Ill. Rev. Stat. 1971, ch. 24, par. 11-13-5) pertains to variations in municipalities of less than 500,000 population and provides in part as follows:

"In municipalities of less than 500,000 population, the regulations authorized by this Division 13 may provide that the board of appeals or corporate authorities may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained in cases where there are practical difficulties or particular hardship in the way of carrying out the strict letter of any of those regulations relating to the use, construction, or alteration of buildings or structures or the use of land. * * * If the power to determine and approve variations is reserved to the corporate authorities, it shall be exercised only by the adoption of ordinances. However, no such variation shall be made by the corporate authorities as specified without a hearing before the board of appeals."

Plaintiffs concede that in the case at bar "the power to determine and approve variations" was reserved to the City Council of the Village of Oak Lawn; and that no ordinance was adopted by the City Council approving the variation. Plaintiffs contend, however, that defendants are estopped from revoking the previously issued building permits because the plaintiffs "in reliance upon the aforesaid building permits, incurred expenses for architects' services, have excavated the said premises, have ordered building materials for the proposed buildings and have incurred other expenses, all in excess of the sum of \$22,000, until prevented from proceeding further by defendants on August 14, 1973."

Plaintiffs rely on People ex rel. Beverly Bank v. Hill, 75 Ill. App.



2d 69, 221 N. E. 2d 40. The court there held that where plaintiffs were led to believe by officials of the Village of Crestwood, who knew plaintiffs would not purchase the property unless it was annexed to the Village and zoned commercial and multiple residential, that these conditions were fulfilled, but a zoning ordinance, although approved by everyone interested, was never formally enacted, the doctrine of equitable estoppel would be applicable, since plaintiffs changed their position by making large expenditures which would not have been made but for the affirmative action of the Village and its officials. However, in the Hill case the record contained sufficient evidence upon which the court could make a determination that the doctrine of estoppel should apply and a writ of mandamus should issue. In the case at bar, judgment for plaintiffs was entered on their motion without the introduction of any evidence. Although the record shows that counsel for defendants agreed to some of the facts alleged by the plaintiffs, he maintained that there must be compliance with the provisions of Section 11-13-5 of the Illinois Municipal Code. Here the record does not contain sufficient agreed facts to show that defendants were estopped from requiring the passage of a variation ordinance by the City Council.

In Western Pride Builders, Inc. v. Koraska, 91 Ill. App. 2d 458, 235 N. E. 2d 313, the plaintiff's request for a building permit was refused by the Building Commissioner of the City of Berwyn. Plaintiff appealed to the Zoning Board of Appeals. The Board denied the request and plaintiff appealed to the circuit court of Cook County, where judgment was entered reversing the Board's order and directing the City of Berwyn to issue a building permit. On appeal, the Appellate Court held that where the Board approved a request for a variation and recommended that the City Council allow said variation and the City Council concurred in the recommendation without a formal ordinance having been presented to or passed by the Council, there was not an exercise of the City Council's power to amend or vary the existing zoning classification, in view of the statutory requirement that a zoning variation must be accomplished by ordinance.



In the case at bar there is a paucity of facts. In the absence of sufficient evidence to invoke the doctrine of estoppel, the variation cannot become effective without the passage of the variation ordinance by the City Council.

Further, plaintiffs have not shown a clear legal right to the writ of mandamus. In Ganley v. City of Chicago, 18 Ill. App. 3d 248, 309 N. E. 2d 653, the City issued permits to construct three one-story, single family residences. Plaintiff immediately started excavating, poured concrete foundations, put in sewers, and put in the back-filling for the buildings. About three weeks after the building permits were issued, the Building Department revoked the permits and halted the construction. Plaintiff filed a complaint for mandamus to compel the reissuance of the permits. After the hearing of evidence, the trial court issued the writ of mandamus and defendant appealed. The Appellate Court held that the City cannot be estopped by an act of its agent beyond the authority conferred upon him and anyone dealing with a governmental body takes the risk of having accurately ascertained that he who purports to act for it stays within the bounds of his authority; that a building permit cannot be granted in violation of the terms of a zoning ordinance; and that an unauthorized permit is a nullity and confers no right on the permittee. The court also held that mandamus is not a writ of right; that it is an extraordinary remedy; that the party seeking the writ must show a clear legal right to the relief requested; and that, at best, plaintiff's legal right to the relief he sought was questionable and the writ of mandamus should not have issued.

In the case at bar, defendants alleged that the issuance of the building permits by an agent of the Village was beyond the authority conferred upon him and granted no rights to the plaintiffs. In the absence of the passage of a variation ordinance by the City Council, the issuance of the building permits was a nullity and conferred no rights on the plaintiffs. Without a full hearing and without evidence the Village was estopped from revoking the building permits, plaintiffs' legal right to the relief sought was questionable, and the writ of mandamus should not have issued.



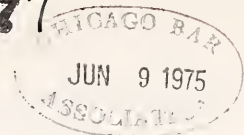
The judgment of the trial court is vacated and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment vacated, cause remanded.

Abstract only.



3D
27 I.A. 1077



No. 60978

CHICAGO JUDO AND KARATE CENTER, INC.,)
)
Appellant-Use Plaintiff,))
)
v.)
)
EDDIE McGEE,)
)
Defendant,)
)
v.)
)
TISZAR GREEN, d/b/a GREENS DISCOUNT)
STORE,)
)
Appellee-Garnishee Defendant.)

APPEAL FROM THE
CIRCUIT COURT
OF COOK COUNTY

HONORABLE
MYRON T. GOMBERG
PRESIDING

Before BARRETT, P.J., DRUCKER, J. and SULLIVAN, J.

PER CURIAM: (First District, Fifth Division)

Use-plaintiff (hereafter plaintiff) appeals from an order which sustained a Section 72 petition^{1/} of garnishee-defendant (hereafter defendant) and vacated plaintiff's judgment of \$508.36.

The record discloses that a judgment by confession was entered on a promissory note against Eddie McGee (McGee) for \$495.50 which, after service of summons, was confirmed on October 16, 1968.

On October 9, 1973, plaintiff garnisheed defendant, as the employer of McGee, and on February 28, 1974, the court entered a final judgment as of January 14, 1974 against defendant for \$508.36. On March 25, 1974, plaintiff garnisheed Sears Bank & Trust Co., as depository of defendant.

On April 24, 1974, defendant filed a motion to vacate the judgment against him, stating the facts as set forth above and also alleging that McGee was never employed by defendant and, by reason thereof, he had a meritorious defense. Plaintiff filed no answer or other pleading to the motion to vacate the judgment.

On May 31, 1974, an order was entered vacating the judgment against defendant. Notice of appeal from that order was duly filed.

^{1/} Ill. Rev. Stat. 1971, ch. 110, par. 72.



Subsequently, a "short record" was presented to the trial court by plaintiff which was a single page statement of the following: That on January 14, 1974 a final judgment was entered against defendant; that on March 26, 1974 plaintiff issued a garnishment summons against the bank account of defendant, and the bank answered full funds; that defendant filed a petition to vacate the final judgment; that the trial court held defendant used due diligence in presenting his petition and also held the petition presented complied with Section 72; that defendant testified McGee never was employed at his store; that the trial court vacated the final judgment against defendant; and that plaintiff appealed from that decision.

Plaintiff filed no excerpts, abstract or reply brief in this court, and no order was entered excusing the filing of excerpts or an abstract.

With leave of this court, defendant filed a supplemental record on January 10, 1975, consisting of a memorandum of opinion of the trial court, which reads as follows:

"Memorandum of Opinion

A final judgment was entered herein on January 14, 1974 pursuant to a summons after conditional judgment having been served upon garnishee defendant herein. Garnishee defendant filed a petition to vacate said judgment pursuant to Section 72 of the Civil Practice Act on April 30, 1974, after a non-wage garnishment summons was served upon garnishee-Green's bank account. The non-wage garnishment was issued March 26, 1974. The Short Record of the proceedings before this court, and presented by counsel for garnishee-defendant, was not contested by plaintiff, and is approved by this court.

The testimony of garnishee defendant that Eddie McGee had never been employed by the garnishee, was not rebutted, and must stand as a strong meritorious defense for any employer. In fact, it is difficult to conceive of any stronger defense of a garnishee defendant.

Although the garnishee defendant has not shown a firm case of due diligence by presenting his petition to vacate about three and one-half months after the entry of the final judgment, this court, in its discretion, and under *Kuh v. Williams* (13 Ill.App.(3) 588) believes that equitable principles of justice and fairness (see *Geo. F. Mueller & Sons Inc. v. Ostrowski*, 19 App.(3) 973) require that the



final judgment herein be vacated and garnishee defendant be given his day in court. The Kuh case stated that a meritorious defense is more important than the question of due diligence. The meritorious defense in that case was lack of consideration and fraud. Surely an allegation and proof of non-employment in a proceedings involving a wage deduction final judgment is just as strong a showing, if not more so, of a meritorious defense as was shown in the Kuh case. Further, plaintiff made no showing of any adverse effect upon him due to the vacation of the final judgment.

ENTER:

M. T. GOMBERG
Judge."

OPINION

A petition to set aside a default judgment under Section 72 is in the nature of a new proceeding which addresses itself to the equitable powers of the court and where, in the interests of justice and fairness, a default judgment has been entered under unfair, unjust or unconscionable circumstances, that judgment will be vacated (Marks v. Gordon Burke Steel Co., 14 Ill.App.3d 191, 301 N.E.2d 835), and only where there has been an abuse of discretion will the judgment of the trial court be reversed. (Geo. F. Mueller & Sons, Inc. v. Ostrowski, 19 Ill.App.3d 973, 313 N.E.2d 684; Calvo v. Willson, 59 Ill.App.2d 399, 405, 207 N.E.2d 496 (Petition for Leave to Appeal denied, 32 Ill.2d 625); Stackler v. Village of Skokie, 53 Ill.App.2d 417, 203 N.E.2d 183.) In a Section 72 proceeding new issues are presented, and it is incumbent upon plaintiff to plead to the petition in some manner and to support his defense thereto by evidence or affidavit. Fox v. Dept. of Revenue, 34 Ill.2d 358, 361, 215 N.E.2d 271; Libert v. Turzynski, 129 Ill.App.2d 146, 150, 262 N.E.2d 741.

In the case at bar, it is asserted in defendant's Section 72 petition and he testified that McGee was never employed by him. Thus, defendant set forth a meritorious defense. Plaintiff's failure to respond to the petition or to this testimony of defendant requires that it be taken as true. (Libert; Elfman v. Evanston Bus Co., 27 Ill.2d 609, 613, 190 N.E.2d 348.) Considering all the circumstances here, the trial court was justified in vacating the



default judgment and setting the case for a hearing on the merits. See Kuh v. Williams, 13 Ill.App.3d 588, 301 N.E.2d 151, where, in referring to Alter & Associates, Inc. v. Zylvitis, 36 Ill.App.2d 195, 183 N.E.2d 750, in which no lack of diligence was found in the filing of a motion to open a judgment four and one-half months after its entry, the Kuh court said at page 592:

"The reason stated, which we consider sound in both law and public policy, was that the question of a meritorious defense is of more importance than the question of defendant's diligence or lack thereof in moving to open the confessed judgment."

See also Lynch v. Illinois Hospital Services, Inc., 38 Ill. App.2d 470, 187 N.E.2d 330, where the court said at page 475:

"A default should be entered when, as a last resort, it is necessary to give the plaintiff his just demand. It should be set aside when it will not cause a hardship upon the plaintiff to go to trial on the merits."

Lynch was cited with approval in Libert.

Here, in view of the undenied allegation that McGee was not in the employ of defendant, the fact that plaintiff's garnishment occurred five years and four months after the original judgment against McGee, and then only after numerous other attempted garnishments on non-employers; and, because there is nothing in the record to indicate that a hearing on the merits would cause any hardship to plaintiff, we cannot say that a delay of three and one-half months was unreasonable.

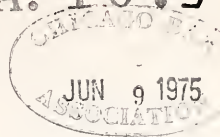
For the reasons stated, we are of the opinion that the trial court did not abuse its discretion in granting defendant's Section 72 petition. Accordingly, the judgment is affirmed and the case is remanded for further proceedings.

Affirmed and remanded for further proceedings.

Publish abstract only.



3D
27 I.A. 1079



60665, 60666, 60667 CONS.

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellant,	)	COOK COUNTY.
)	
v.)	_____
)	
RONALD GAMBLE, SHIRLEY LANE, and	)	HONORABLE
RONALD BELL,	)	JOHN GANNON,
	)	JUDGE PRESIDING.
Defendants-Appellees.)	

BEFORE BARRETT, P.J., DRUCKER, J., and LORENZ, J.

PER CURIAM, First District, Fifth Division.

The State brings this consolidated appeal pursuant to Supreme Court Rule 604(a)(1) from orders of the Circuit Court of Cook County sustaining a pre-trial motion to suppress evidence filed by defendants Ronald Gamble, Shirley Lane, and Ronald Bell.

On May 15, 1973, members of the Metropolitan Enforcement Group seized from defendants certain evidence pursuant to a warrant authorizing the search of Ron Doe, Shirley Lane, and the house located at 7617 S. Michigan Ave., Chicago. Ronald Gamble was charged in a criminal complaint with the offense of failure to possess a State of Illinois firearm owner's identification card; Shirley Lane was charged in a criminal complaint with the unlawful possession of a controlled substance (cocaine); and Ronald Bell was charged in a criminal complaint with the unlawful possession of a controlled substance (heroin).

The State contends that the trial court erred in suppressing the evidence. Defendants have filed no brief on this appeal and consequently this court may reverse the trial

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court orders pro forma. (People v. Elliott, 9 Ill.App.3d 178, 292 N.E.2d 58.) However, in the interests of justice we will consider the merits of the appeal. See People v. Farrell, 20 Ill.App.3d 786, 314 N.E.2d 538.

On May 15, 1973, a search warrant was issued authorizing the search of one Ron (Doe) M/N 29-32 5'9-5'11, light skinned Negro and one Shirley Lane, F/N 28 and the premises located at 7617 South Michigan Avenue (a single family dwelling), Chicago, Illinois. The warrant authorized the seizure of all heroin, heroin derivatives, mixtures, compounds and preparations containing heroin, all instruments, articles and paraphernalia used to process, package and prepare heroin, and all cocaine substances which are in violation of the Controlled Substances Act of the State of Illinois.

The warrant was based upon a detailed complaint sworn out by Cook County Sheriff's Police Investigator Richard Lobes, one of seven police officers who participated in the search and subsequent arrest of the defendants.

The complaint alleged that on May 7, 1973, and again on May 14, 1973 an informer (whose reliability is set forth in the complaint and not at issue here) purchased a quantity of heroin from a male named Ron and a female named Shirley Lane at the Michigan Avenue address. That on May 14, Ron and Shirley exhibited a large quantity of heroin and cocaine and also removed a quantity of heroin from a white-over-blue colored 1973 Cadillac automobile parked in front of the house in question. The complaint stated that if the informer wished to acquire any narcotics in the future, that either Lane or Ron could be contacted at the house. It also alleged that Ron



kept two large attack trained, German shepherd dogs in the house along with two revolvers, one of which was cocked and on the table where the narcotics were kept. The complaint contains a statement by Officer Lobes substantiating the presence of the dogs and the automobile.

Officer Lobes testified at the hearing on defendant's motion to suppress evidence that on the date in question he and six other narcotics agents parked their automobile at 7600 S. Michigan Avenue and proceeded on foot from the opposite side of the street to the single family dwelling at 7617 S. Michigan Avenue. As the officers approached the premises, four individuals, including the three defendants, were observed by the officers running out of the house. As the officers ran toward the defendants they announced their office, ordered the fleeing individuals to stop, and stated that they had a search warrant for the house. Defendant Ronald Gamble proceeded back into the house and was apprehended in the front doorway. Shirley Lane was stopped at the rear of the house immediately after having been observed discarding a vial containing cocaine. Agent Lobes testified that defendant Ronald Bell ran toward a Cadillac standing in front of the premises and entered the vehicle. He was removed from the car and searched by the police.

The first issue before us is whether the firearm found on Ronald Gamble was improperly suppressed when it was obtained pursuant to a warrant authorizing the search of the person and of the premises.

As the police searched Ron Gamble in the doorway to the house on Michigan Avenue, they had in their possession a warrant for the search of a "Ron (Doe) M/N 29-32 5'9-5'11, light skinned Negro . . . and the premises at 7617 S. Michigan (a



single family dwelling) Avenue, Chicago, Ill., Cook County." The warrant described both the place and the person to be searched with sufficient particularity. (People v. Staes, 92 Ill.App.2d 156, 235 N.E.2d 882.) Upon examination at the suppression hearing Agent Lobes was asked: "Did Mr. Gamble, officer, match the description of the person named in the search warrant?" The answer was in the affirmative. We find that under these facts there was no doubt in Agent Lobes' mind who and what was to be searched.

The particular circumstances surrounding the seizure of the gun from defendant Gamble, which forms the basis of the instant charge against him, do not appear of record; the burden was upon him to demonstrate that the search as to him was illegal, and it must therefore be presumed that the manner in which the gun was confiscated by the police was proper. (People v. Endress, 5 Ill.App.3d 821, 284 N.E.2d 725; Ill. Rev. Stat. 1973, ch. 38, par. 114-12.) The motion to suppress should have been denied as to defendant Ronald Gamble.

With respect to the defendant Shirley Lane, we have before us the issue whether in fact there was a "search" where the particular contraband was abandoned.

The testimony at the hearing to suppress the evidence revealed that Miss Lane threw a plastic vial of cocaine into the dirt as she was running to the rear of the house. Officer Lobes testified that he kept the vial under his surveillance from the time it left the defendant's hand to the time it hit the ground and that he subsequently retrieved it.

The Illinois Supreme Court has held that "a search implies a prying into hidden places for that which is concealed, and it is not a search to observe that which is open to view."



(People v. Davis, 33 Ill.2d 134, 210 N.E.2d 530.) In considering a factual situation similar to the one at bar, the court in People v. Sylvester stated:

"The bag (of marijuana) was sitting in plain and open view on the sidewalk curb where it had been abandoned by defendant, and its seizure by the officers under these circumstances in no way violated any constitutional rights of defendant." (People v. Sylvester, 43 Ill.2d 325, 253 N.E.2d 429.)

We find that in the instant case no "search" had ever occurred so that the trial judge improperly suppressed the evidence which forms the basis of the charge against defendant Shirley Lane.

The next issue with which the court is confronted is whether the heroin found on Ronald Bell was illegally seized so as to justify its suppression.

The State contends that there was probable cause for the arrest and search of Bell. It is beyond dispute that contraband seized during a search incident to a lawful arrest is not subject to suppression as evidence. In the instant case the record reveals that as police officers approached the house described in the search warrant Bell, with Gamble, Lane and a fourth person, fled from it. Despite the fact that Officer Lobes announced his office and ordered him to stop, Bell proceeded to a Cadillac automobile parked in front of the house. The complaint for the search warrant stated that a 1973 Cadillac in which contraband was stored was kept parked directly in front of the house. Clearly, under these circumstances, Officer Lobes had sufficient probable cause to arrest and search Bell. Therefore, we hold that the trial court erred in suppressing as evidence the heroin seized from him.



60665, 60666, 60667 Cons.

For the foregoing reasons we reverse the orders entered below and remand the causes for further proceedings.

REVERSED AND REMANDED.

PUBLISH ABSTRACT ONLY.



3D
27 I.A. 1073



No. 60147

PEOPLE OF THE STATE OF ILLINOIS,)
) APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,)
) COURT OF COOK COUNTY.
v.)
) HONORABLE
EDDIE JAMES HILLS,) LOUIS P. GARIPPO,
) PRESIDING.
Defendant-Appellant.)

MR. JUSTICE McNAMARA delivered the opinion of the court:

Defendant, Eddie James Hills, was found guilty after a bench trial in the circuit court of Cook County of the crimes of murder and aggravated battery. He was sentenced to a term of fourteen to eighteen years on the charge of murder of Ruth Lee Hogan. Defendant contends on appeal that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

At trial, Ida Mae O'Neal testified that on July 1, 1972, she lived with her sister, the decedent, in an apartment in the City of Chicago. At approximately 1:30 a.m. the two women were in the kitchen watching television. Jimmy Hills was asleep in the living room, while Bill Alexander slept in the kitchen. Defendant came to the apartment and asked the decedent for money. The decedent replied that she had no money and went into the bathroom with the defendant. When they emerged from the bathroom, defendant approached Miss O'Neal and placed his arm around her neck. The witness asked defendant to leave her alone. Defendant then drew a large knife from his belt and placed it against Miss O'Neal's neck, and ordered her to stand. Miss O'Neal arose and went to the kitchen drawer to get a small knife. An argument ensued during which defendant stabbed the witness in the shoulder. Defendant stabbed her a second time and she fell back through a door onto the back porch. Miss O'Neal bore scars from both knife wounds. When defendant attempted to stab the witness a third time, the decedent positioned herself in front of the defendant. She told defendant to leave Miss O'Neal alone, but defendant ordered her to move out of the way. When the decedent did not move, defendant stabbed her in the area of the left shoulder. Defendant then fled. When the decedent screamed that she had been



stabbed, the two men who had been asleep awakened. The police arrived five minutes later and transported the decedent to a hospital.

It was stipulated that if Dr. E. J. Shalgos were called to testify he would state that he is a pathologist for the coroner of Cook County. He examined the decedent's body on July 1, 1972, and in his opinion she died as a result of a stab wound of the chest (lung).

Defendant testified that on the date in question he lived in an apartment with his brother, Jimmy Hills, and his brother's wife, the decedent. Defendant returned from the store and entered the kitchen. He asked Miss O'Neal what was on television. When she did not reply, defendant attempted to put his arm around her shoulder. She knocked his arm and told him to leave her alone. Miss O'Neal then went to a cabinet drawer and pulled out a butcher knife. Defendant went to the living room and took a small steak knife from a table. He then returned to the kitchen. Miss O'Neal began playing with him with the butcher knife and cut him on the right hand. The decedent intervened and stopped the fight. Defendant left the apartment and went to his cousin's home. He denied cutting either woman. When he left the apartment, the decedent was trying to take the knife away from Miss O'Neal. After hearing that decedent had been killed defendant surrendered to the police.

Defendant contends initially that the evidence was insufficient to establish his guilt beyond a reasonable doubt because his testimony was more credible than that of the sole prosecution witness. This court has often stated the rule that in a bench trial the credibility of witnesses is for the trier of fact to determine and that decision will not be disturbed on appeal unless it is based upon evidence which is so unsatisfactory as to raise a reasonable doubt as to defendant's guilt. (People v. Hampton (1969), 44 Ill.2d 41, 253 N.E.2d 385; People v. Pointer (1972), 6 Ill.App.3d 113, 285 N.E.2d 171.) The testimony of a single witness, where positive and credible,



is sufficient to sustain a conviction even though contradicted by the accused. People v. Griffin (1973), 12 Ill.App.3d 193, 297 N.E. 2d 770.

In the present case, Miss O'Neal testified that defendant came into her apartment which she shared with her sister, the deceased. He demanded money. When the witness rejected defendant's request, he pulled a large knife from his belt and threatened her. An argument ensued during which defendant stabbed Miss O'Neal in the chest and shoulder. When defendant attempted to stab her the third time, the deceased tried to prevent it. When the decedent refused to obey defendant's orders to move, he stabbed her and fled. Miss O'Neal bore the scars from the stab wounds. Defendant now attempts to discredit her testimony by arguing that she was personally implicated in the crime. Defendant urges this court to treat Miss O'Neal's testimony in the same manner as that of an accomplice. However, the record, excluding defendant's testimony, does not indicate that Miss O'Neal was an accomplice or that her testimony should be so treated. The rule is well established that a trial judge is not obliged to believe the defendant's testimony. People v. Lahori (1973), 13 Ill.App.3d 572, 390 N.E.2d 761; People v. Kaprelian (1972), 6 Ill.App.3d 1066, 286 N.E.2d 613.

Defendant also maintains that the fact that Miss O'Neal did not awaken her boyfriend during the incident renders her testimony untrustworthy. This at best raises a question of credibility which was for the trier of fact to determine. Defendant further urges that the State's failure to call Billy Alexander or Jimmy Hills as its witnesses creates an inference that their testimony would have been favorable to the defendant. Neither man was a witness to the killing and their testimony would have added little to the State's case. In addition, the State is not obliged to produce every witness to a crime and the failure to do so does not raise the presumption that the testimony would have been unfavorable to the prosecution. (People v. DeSavieu (1973), 11 Ill.App.3d 529, 297



N.E.2d 336; People v. Jones (1964), 30 Ill.2d 186, 195 N.E.2d 698.)

After a complete review of the record, we conclude that the prosecution witness's testimony was positive, credible and sufficient to establish defendant's guilt beyond a reasonable doubt.

Defendant next contends that the evidence was insufficient to establish a causal relationship between his actions and the stipulated cause of death. In support of this argument defendant cites People v. Martin (1963), 26 Ill.2d 547, 188 N.E.2d 4; People v. Benson (1960), 19 Ill.2d 50, 166 N.E.2d 80; and People v. Snarling (1967), 83 Ill.App.2d 104, 226 N.E.2d 54. However, in each of these cases the criminal act was not of such a nature that would normally cause death or great bodily harm, and the relationship between the criminal agency and the cause of death was left to inference and speculation.

In the instant case, the testimony presented by the State established that the deceased was stabbed in the area of the left shoulder. The stipulated testimony of the pathologist was that the deceased died of a stab wound of the chest (lung). Where the State has shown the existence, through an act of the accused, of a sufficient cause of death, the death is presumed to have resulted from such act. (People v. Stowers (1971), 133 Ill.App.2d 627, 273 N.E.2d 493.) Here, the record does not suggest any act as a cause of death disconnected with the stabbing of the deceased by defendant. Under these facts we hold that there was sufficient evidence for the trial court to conclude that the knife wound inflicted by the defendant upon the deceased was the cause of death.

For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

McGLOON, P.J., and DEMPSEY, J., concur.





Hon. Anthony J. Bosco,
Judge Presiding.

On December 2, 1973, at 3:20 a.m., Officer William Town was on patrol in Chicago with his partner. They drove past defendant while he was walking on 111th Street and watched as he turned onto Bishop Street. The officer turned the patrol car around to keep defendant in view. Officer Town testified that as they were turning the car around he saw defendant place an object in front of a tire of a car parked at the curb. The lighting in the area was good and Officer Town was able to see defendant's action clearly. The two policemen left their car, approached the defendant, and asked him for some identification. Officer Town went to the area where he had seen defendant place the object and recovered a handgun. At no time did the officers actually see the weapon in

defendant's possession. Defendant, testifying on his own behalf, denied that he had a gun that evening or had placed anything under the car in question.

Defendant first claims that the evidence presented by the State was insufficient to support the conclusion that the weapon was in fact being carried concealed. The officers saw defendant but not the gun and saw him place an object under the car which later proved to be a gun, so that the conclusion that the weapon was being carried concealed would normally be persuasive. However, it is urged by the defendant that the testimony as to the nature and manner of observation was insufficient to support this conclusion, particularly as to what parts of defendant would be observed and whether he had been kept under constant observation.

We find no merit in this argument. The testimony as to the officers' observation was clearly sufficient to sustain the finding of guilt. The points upon which there was no testimony offered, such as the speed the car was moving when defendant was first observed, are not persuasive as the record in this regard only reflects the officer's statement that he was able to see defendant clearly and that the lighting was good. If the squad car was traveling at excessive speed or there were obstacles to the officer's view of defendant, these facts do not appear on the record before this court and we will not speculate as to their existence and possible effect.

Defendant further claims that the State did not prove him guilty beyond a reasonable doubt since the facts presented "were consistent with the imminent hypothesis that [defendant] was carrying the gun in plain view," and the conviction must



be reversed as a result. (People v. Hutchinson, 50 Ill. App. 2d 238, 200 N.E. 2d 416; People v. Lucas, 109 Ill. App. 2d 303, 243 N.E. 2d 706.) We disagree as the officer stated he had a clear view of defendant and did not see a gun in his hand. It should also be noted that this theory is contradicted by defendant's own testimony that he did not have a gun at all. In order to accept this theory we would have to reject not only Officer Town's testimony, but that of defendant as well.

For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

DIERINGER, P.J., and BURMAN, J., concur.
(ABSTRACT ONLY)





No. 60176

PEOPLE OF THE STATE OF ILLINOIS,)	
ex rel. JOHNNY BERLIN,)	
	)	APPEAL FROM THE CIRCUIT
Relator-Appellant,)	
	)	COURT OF COOK COUNTY.
v.)	
	)	HONORABLE
JOHN J. TWOMEY, SUPERINTENDENT,	)	JOSEPH A. POWER,
ILLINOIS STATE PENITENTIARY,	)	PRESIDING.
JOLIET, ILLINOIS,)	
)	
Respondent-Appellee.)	

Before McGLOON, P.J., McNAMARA and MEJDA, JJ.

PER CURIAM:

Defendant was convicted after a jury trial of the crime of robbery. (Ill.Rev.Stat. 1969, ch.38,par.18-1.) He was sentenced to a term of ten to fifteen years. Defendant appealed and on April 28, 1971, this court affirmed the judgment of conviction. (People v. Berlin (1971), 132 Ill.App.2d 697, 270 N.E.2d 461.) On July 16, 1973, defendant filed a pro se petition for a writ of habeas corpus. On August 9, 1973, the trial court granted the State's motion to dismiss the petition.

Defendant wished to appeal the order of dismissal and the public defender of Cook County was appointed to represent him. After examining the record, the public defender has filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California (1967), 386 U.S. 738, a brief in support of the petition has also been filed. The brief states, in effect, that an appeal in this case would be wholly frivolous and without merit. On January 8, 1975, defendant was mailed copies of the motion and brief. He was informed that he had until April 6, 1975, to file any additional points he might choose in support of his appeal. He has not responded.

In his petition for a writ of habeas corpus the defendant's only argument was that he is entitled to a reduction in his minimum sentence from ten years to five years under the provisions of the Unified Code of Corrections, which states that the minimum term shall not be greater than one-third of the maximum term set by the court. (Ill.Rev.Stat. 1973, ch.38,par.1005-8-1 (c) (3).)

It has long been established in this State that a court has



jurisdiction in habeas corpus proceedings only where it can be shown that the original judgment of conviction was void or where something has happened since the rendition of the judgment to entitle the prisoner to his outright release. (People ex rel. Totten v. Frye (1968), 39 Ill.2d 549, 237 N.E.2d 798; People ex rel. Crump v. Brantley (1974), 17 Ill.App.3d 318, 307 N.E.2d 651.) Habeas corpus is not available to review errors of a non-jurisdictional nature. (People ex rel. Skinner v. Randolph (1966), 35 Ill.2d 589, 221 N.E.2d 279; People ex rel. Rose v. Randolph (1965), 33 Ill.2d 453, 211 N.E.2d 685.) Here, the defendant has not in any way alleged that his original conviction was void and nothing has happened since its rendition to entitle defendant to his outright release. See People ex rel. De'ario v. Twomey (March, 1975, No. 59664), --Ill.App.3d--.

The Supreme Court has held that an inartfully drawn pro se petition for a writ of habeas corpus may be treated as a request for relief under the Post-Conviction Hearing Act (Ill.Rev.Stat. 1973, ch.38, pars.122-1 et seq.). (People ex rel. Palmer v. Twomey (1973), 53 Ill.2d 479, 292 N.E.2d 379.) Even if we were to so consider defendant's petition, he would not be entitled to relief. The Unified Code of Corrections was not effective until January 1, 1973. The Code states that the sentencing provisions shall apply if they are less than under the prior law where "****the offense being prosecuted has not reached the sentencing stage or a final adjudication****" (Ill.Rev.Stat. 1973, ch.38, par.1008-2-4.) The term "final adjudication" refers to the conclusion of defendant's direct appeal. (People v. Chupich (1973), 53 Ill.2d 572, 295 N.E. 2d 1; People v. Nixon (1974), 17 Ill.App.3d 112, 308 N.E.2d 17.) Since at the time of the enactment of the Unified Code of Corrections the defendant's case had reached the state of final adjudication, the defendant is not entitled to the benefits of the Unified Code of Corrections and the precept that the minimum shall not exceed one-third of the maximum sentence is not applicable.

We have examined the record and concur in the opinion of the public defender that the argument thus raised does not have merit.



Our inspection of the record does not disclose any additional possible grounds for an appeal. Accordingly, the public defender of Cook County is granted leave to withdraw as counsel on appeal and the order of the circuit court of Cook County dismissing the writ is affirmed.

Motion allowed;
Order affirmed.



27 I.A. 1076^{3D}



60480

JONATHAN C. AGWADA,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM
)	
	)	CIRCUIT COURT,
v.)	
	)	COOK COUNTY.
)	
ABBOTT LABORATORIES and STATE OF)	
ILLINOIS DEPARTMENT OF LABOR,	)	Honorable Edward F. Healy,
BOARD OF REVIEW, et al.,	)	Presiding.
)	
Defendants-Appellants.)	

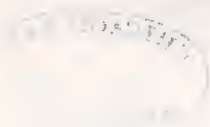
Mr. PRESIDING JUSTICE DIERINGER delivered the opinion of the court:

This action was brought in the Circuit Court of Cook County by the plaintiff, Jonathan C. Agwada, after the Board of Review of the Department of Labor of the State of Illinois determined that he was ineligible for unemployment compensation benefits under Section 601-A of the Illinois Unemployment Compensation Act (Ill. Rev. Stat., 1969, Ch. 48, § 431-A). The plaintiff filed for administrative review of the Board's decision, and the Circuit Court of Cook County reversed, holding that it was against the manifest weight of the evidence. The defendants appeal from that judgment.

The issue presented for review is whether the decision of the Board of Review of the Department of Labor was against the manifest weight of the evidence.

The appellee, Jonathan C. Agwada, has not filed an appearance or brief in accordance with the Supreme Court Rules, and in such circumstances this court may determine the case on its merits or, in its sound discretion, reverse based on the failure of the appellee to comply with the Supreme Court Rules. People ex rel. Pullman Bank & Trust Co. v. Fitzgerald, (1973) 14 Ill. App.3d 247; Shinn v. County Board of School Trustees, (1970) 130 Ill. App.2d 908; Woodward v. Woodward, (1968) 96 Ill. App.2d 551.

In view of the fact that the plaintiff has abandoned his case, we see no reason why we must act as his attorney by search-



ing the record. Therefore, we decline to go into the merits of the case, and the case is reversed pro forma.

The judgment of the Circuit Court of Cook County is reversed.

REVERSED.

ADESKO and JOHNSON, JJ., concur.

Abstract only.





60547

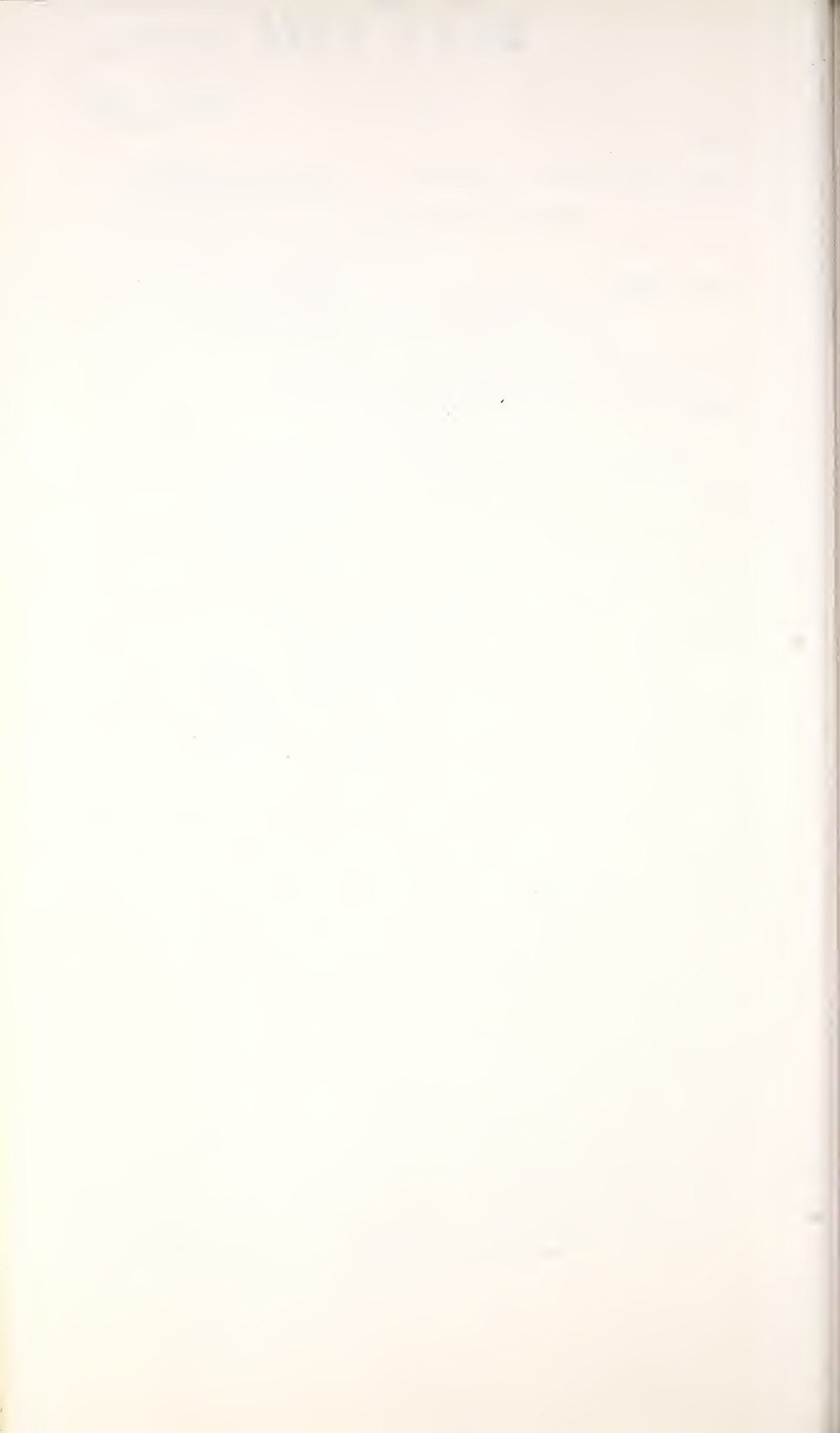
PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,)	
)	
v.)	
)	
ISAIAH SPANN,	)	HONORABLE
	)	LOUIS P. GARIPPO,
Defendant-Appellant.)	)	PRESIDING.

PER CURIAM: FIRST DISTRICT, FIFTH DIVISION.

BEFORE DRUCKER, LORENZ AND SULLIVAN, JJ.

Defendant and Roosevelt Willis were charged by indictment with the crime of armed robbery (Ill. Rev. Stat. 1971, ch. 38, par. 18-2). After a bench trial Willis was found not guilty. Defendant was found guilty of robbery and sentenced to a term of one to four years. He appeals arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

At trial Alonzo White testified that on March 10, 1972, at approximately 9:20 P.M., he was walking north on Kilbourn Street toward Madison Street when he was approached by two men whom he subsequently identified as defendant and Willis. When the men were approximately three feet away, defendant pulled out a gun, pointed it directly at White and said, "Don't move." While defendant pushed White up against the building, Willis stood on the sidewalk approximately five feet away. Defendant held a gun to White's head and ordered him to put up his hands. Willis stated that someone was coming, and defendant pushed White down the stairs at the rear of the building where he took a ten dollar bill from White's pocket. Willis came to the rear of the building and asked how much money White had. White replied ten dollars, and Willis then returned to the front of the building. Defendant walked out to the street where Willis was waiting, and both men walked south on Kilbourn. White testified that he then walked to the corner and flagged down a squad car. White got in the back



of the squad car and approximately one block away identified defendant and Willis who were walking down the street. The officers got out of the squad car and placed them under arrest.

Chicago Police Officer Guffrea testified that on March 10, 1972, he and his partner, Officer Hayes, were on patrol when at approximately 9:25 P.M. in the vicinity of Madison and Kilbourn Streets, they were flagged down by Alonzo White. After a short conversation, White entered the police vehicle, and they conducted a tour of the area. As they were proceeding westbound on Monroe, they approached two men whom White identified as the men who had robbed him. Officer Guffrea testified that he and his partner exited their squad car and placed them under arrest. A search of defendant revealed a ten dollar bill. Officer Guffrea testified that as he was approaching he observed one of the men make a motion as if throwing something into a grassy embankment nearby. A search of that grassy embankment revealed a gun.

Defendant testified that on March 10, 1972, between 9:00 and 9:30 P.M., he was walking down the street when he was approached by Alonzo White. White asked for directions and then asked if he could walk with defendant who agreed, and as they walked down the street defendant said, "I don't see no money." White then produced a ten dollar bill and asked if that was all right. Defendant stated that he took the ten dollars, called White a fool and kept walking. Defendant stated that he turned west on Monroe and there met Willis. After walking for a short distance with Willis, defendant observed a police car. Defendant stated that he dropped a pistol which he had on his person and kept walking. The police then placed him and Willis under arrest. Defendant denied ever taking money from White by the use of a gun.

Willis testified that at approximately 9:20 P.M. on March 10, 1972, he was walking in the area of Kilbourn and Monroe when he



met defendant who asked him for a cigarette. Willis replied that he had none and kept walking. Willis walked around the corner, going west on Monroe, when defendant again approached him from behind. Both men began to walk together when a squad car pulled up, and both men were placed under arrest. Willis stated that later at the police station he heard White tell the police that he was not sure if Willis was with defendant at the time of the robbery. Willis further testified that Officer Hayes told White that if he didn't say Willis had participated in the robbery, then Willis would have to be released and thus "could come and do something to him and stop him from appearing in court on [defendant]." When Willis told Hayes he had overheard the conversation with White, the officer slapped him.

Opinion

Defendant's only argument on appeal is that the evidence was insufficient to establish his guilt beyond a reasonable doubt since the trial court's finding of not guilty as to Willis, which was based upon the testimony of the complaining witness who testified as to a single transaction involving both men, was inconsistent with his being found guilty. In People v. Hill, 14 Ill. App.3d 368, 302 N.E.2d 403, this court stated the rule regarding inconsistency of verdicts where, quoting People v. Jones, 132 Ill. App.2d 623, 270 N.E.2d 288, we held:

"The rule is that where a verdict is reversed for inconsistency in such cases, the verdicts must have been based on precisely the same evidence, identical in all respects as to both defendants."

Where there is the slightest difference in the evidence as to the two defendants jointly tried, the trier of fact may weigh the evidence as to each defendant, and the fact that one may be acquitted while the other is convicted does not require a reversal merely because the evidence involving the acquitted



defendant to some extent also involved the convicted defendant. People v. Fort, 133 Ill. App.2d 473, 273 N.E.2d 439.

In the case at bar the testimony as to defendant and Willis was not identical. White testified that both defendant and Willis approached him as he was walking down the street. However, thereafter the actions of both men differed substantially. It was defendant who put a gun to White's head and announced a robbery. Defendant then took the complainant to the rear of the building, pushed him down some steps and took a ten dollar bill from his person. During the incident Willis' only involvement was that he stood on the sidewalk some distance away, and that he on one occasion asked White how much money he had. When arrested it was defendant who had the proceeds of the robbery on his person, and it was defendant who had a gun which he attempted to hide as the police officers approached. Willis denied any participation in the robbery and testified that White had been coerced into testifying against him by a police officer. Since the evidence was not identical as to defendant and Willis, the trial court's finding of not guilty as to Willis is not so irreconcilable with the finding of guilty as to defendant so as to create a reasonable doubt of his guilt. People v. Walls, 18 Ill. App.3d 1075, 311 N.E.2d 202.

Accordingly the judgment of the trial court is affirmed.

AFFIRMED.

Abstract only.











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